Supreme Court, U.S.
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No.:

In The

THE SUPREME COURT OF THE UNITED STATES

CARRIE CORCORAN, as Executrix of the Estate of Eugene Corcoran, deceased, and CARRIE CORCORAN, individually,

Petitioners,

v.

NEW YORK POWER AUTHORITY, and WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Carrie Corcoran
Petitioner Pro Se
8297 South Ridge Drive
Macungie, Pennsylvania
(610) 965-5766
(212) 373-3377

219 pp

This Petition seeks review of judgments from two interrelated cases. In the first case, Petitioner pursued wrongful death claims as "public liability actions"("PLAs"), see 42 U.S.C. § 2014(hh). After bifurcated discovery limited to timeliness issues, the court granted summary judgment to Respondents on the grounds that the PLAs were time-barred. Petitioner filed a timely motion under Rule 59(e) of the Federal Rules of Civil Procedure urging the court to consider her claims under a civil rights theory of recovery. Based on undisputed facts, Petitioner has timely civil rights claims, provided they relate back to the filing of the original Complaints. The court held it was "simply too late" to consider the civil rights claims. It noted that in any event, Plaintiff had filed a "new action" asserting the same claims.

The same court dismissed the "new action," holding it was time-barred because it did not relate back to the first case. The court also sanctioned Petitioner, warning her to cease litigating claims for her father's death or suffer the consequences.

QUESTIONS PRESENTED FOR REVIEW:

1. Did the court abuse its discretion in refusing to consider a legal theory of recovery based on the civil rights statutes when the pro se plaintiff did not assert this theory of recovery until her motion to reconsider the dismissal of her PLAs as time-barred, where no new discovery was needed to determine that the civil rights claims were timely?

2. When a plaintiff commences a second suit while her first suit is still pending and both suits allege virtually identical facts but different causes of action, does the court abuse its discretion in refusing to allow the second suit to relate back to the date the first suit was commenced?

3. Did the court abuse its discretion in sanctioning the pro se plaintiff with a warning that she must stop litigating claims based on her father's death just because she had already filed three cases involving several motions?

PARTIES TO THE PROCEEDINGS BELOW:

This Petition seeks review of judgments from two interrelated cases. These two cases include three separately filed lawsuits with the first two lawsuits consolidated into one case. The Plaintiffs to the all of the proceedings below are the same as the Petitioners in the caption of this Petition-- Carrie Corcoran, as Executrix of the Estate of Eugene Corcoran, deceased, and Carrie Corcoran, individually.

The Defendants in the first lawsuit are New York Power Authority, ("NYPA") and Wedco Corp. The district court dismissed Wedco Corp. from the suit and Petitioner did not appeal this decision.

The Defendant in the second lawsuit is Westinghouse Electric Corporation ("Westinghouse"). The district court consolidated the case against NYPA and the case against Westinghouse. These consolidated lawsuits are referred to here as "Corcoran I."

The named Defendants in the second case ("Corcoran II") are: Leroy W. Sinclair; J.P. Bayne; John C. Russell; Dennis Quinn; Joseph Perrotta; Hugh Gilmartin; Ian Mew; Robert Deschamps; Paul Saunders; John Neff; Maryann Chaubard; Thomas Michael Phillips; Rick Mould; Charles Florin; Steve Tencza; and DOES 1 through 25, inclusive. These named Defendants were employees of NYPA or Westinghouse during the time of the alleged incident. The caption of the case does not state the capacities in which the Defendants are sued; however, the body of the Complaint does state claims against the named Defendants in both their individual and official capacities. Defendants, in their brief in support of their motion to dismiss and/or for summary judgment, expressed confusion as to the capacities in which the parties were being sued. In their opposition brief, Plaintiffs clarified their intent to sue the named Defendants in both individual and official capacities and requested leave to amend the Complaint to clarify the suit.

Whether the courts below considered Corcoran II a case against the named defendants only in their individual capacity or both in their individual and official capacities, varies with each case. In Corcoran I's appeal, the Second Circuit clearly construed Corcoran II as a suit against "NYPA, Westinghouse, and several individual defendants." Petitioners' Appendix at 66. However, in Corcoran II, the courts construe Corcoran II as a suit against the named defendants only in their individual capacities. Id. at 102-03 ("[P]laintiffs' allegations of wrongdoing in the instant action are virtually identical to those asserted in Corcoran I, albeit against individual employees of NYPA and Westinghouse rather than the entities themselves"); id. at 149 ("[T]he plaintiffs have sued new defendants in this action and therefore, the defendants named herein were not on notice through the filing of Corcoran I").

The courts' inconsistent characterizations of Corcoran II's Defendants rest solely upon which characterization best supports a reason for closing the door on the civil rights claims against the Entities in the case at hand. One of the reasons that Petitioner seeks review of both cases in one writ of certiorari is to draw this Court's attention to this inconsistency.

In any event, the named defendants in Corcoran II are Respondents only to the extent Corcoran II is construed as a suit against them in their official capacities-- which is another way of pleading an action against the entity, see Hafer v. Melo, 502 U.S. 21, 25 (1991).

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Opinions in Corcoran I:

The opinion and judgment of the United States Court of Appeals for the Second Circuit is reported at --- F.3d---, 1999 U.S. App. LEXIS 24288 (2d Cir. Sept. 29, 1999) and is reprinted in the attached Appendix ("Pet. App.") at 59-86. It affirms the unpublished opinions of the United States Court for the Southern District of New York entered on Sept. 29, 1997, (Pet. App. at 32-49) and May 27, 1998 (Pet. App. at and 50-58). A prior district court decision --935 F. Supp. 376 (S.D.N.Y. 1996)-- which granted in part and denied in part, Defendants' motion to dismiss, is reprinted in Pet. App. at 1-31.

Opinions in Corcoran II:

The magistrate's report and recommendation, (Pet. App. at 85-127) was entered on December 1, 1998. The district court's opinion (Pet. App. at 128-57) was entered on March 30, 1999. On December 23, 1999, the United States Court of Appeals for the Second Circuit summarily affirmed the district court's decision. See Pet. App. at 158-60.

JURISDICTION

The judgment in Corcoran I was entered on September 29, 1999. Petitioner timely filed a petition for panel rehearing and rehearing en banc. The court below entered an order (Pet. App. at 87) denying the petition on December 7, 1999. The judgment in Corcoran II was entered on December 23, 1999. Petitioner timely filed a petition for panel rehearing. The petition was denied on February 7, 2000. Pet. App. at 161.

This Petition for Writ of Certiorari is filed within ninety days of the denials of the petitions for rehearing in both cases. The jurisdiction of this Court to review these judgments on petition for certiorari rests upon section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

RULES

This Petition involves consideration of the following rules: Fed. R. Civ. P. 11 (1999) (Pet. App. at 162); Fed. R. Civ. P. 15 (1999) (Pet. App. at 165); and Fed. R. Civ. P. 59 (1999) (Pet. App. at 177).

STATEMENT OF THE CASE

Petitioner's attorney filed a wrongful death action in state court against New York Power Authority ("NYPA"). [1] The attorney withdrew from the case, but encouraged Petitioner to proceed pro se. When the Complaint was served, Petitioner, Carrie Corcoran, was the pro se plaintiff in a lawsuit that alleged her father's death from leukemia was caused by radiation exposure at NYPA's Indian Point 3 Nuclear Power Plant ("IP3").

Respondents removed the case [2] to federal court. [3] Petitioner amended the Complaint asserting Public Liability Actions ("PLAs"), see 42 U.S.C. § 2014(hh), and also instituted a new similar action, against Westinghouse Electric Corporation [4] ("Westinghouse"). The district court consolidated the suits ("Corcoran I"), granted leave to amend the Complaints once more, and ordered bifurcated discovery limited to the timeliness of the claims. At the completion of discovery, the court granted summary judgment to Defendants on the grounds that the PLAs were time-barred. Petitioner filed a timely motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, asking the court to consider the facts

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[1] Corcoran v. New York Power Authority and Wedco Corp., No. 95-106365 (N.Y. Sup. Ct. Mar. 14, 1995).

[2] Corcoran v. NYPA, No. 95 Civ. 5357 (DLC) (S.D.N.Y. 1995).

[3] The case was removed pursuant to 42 U.S.C. § 2210(n)(2) of the Atomic Energy Act, 42 U.S.C. §§ 2011, et seq.

[4] Corcoran v. Westinghouse Elec. Corp., No. 95 Civ. 8102(DLC) (S.D.N.Y. Sept. 21, 1995).

already alleged in the Complaints under a civil rights theory of recovery. Petitioner requested leave to amend Corcoran I to clarify her intent to pursue civil rights claims.

The court denied the reconsideration motion and held that it was "simply too late for the plaintiffs to amend their complaints to add these new claims." Pet. App. at 57. The court reasoned that it had already "carefully considered two substantial substantive motions in the case," and the parties had extensive discovery. Id. at 57-58. Although discovery was extensive, it had been bifurcated to the issue of timeliness. Plaintiffs "new claims" needed no further discovery on this issue. On the undisputed facts,[5] Petitioner has timely civil rights claims-- provided the claims related back to the filing dates of the original Complaints.[6]

While waiting for the district court's decision on the Rule 59(e) motion in Corcoran I, Petitioner instituted a new action, Corcoran v. Sinclair,[7] (hereinafter "Corcoran II"). Petitioner pled causes of action under the civil rights statutes, including claims for violations of their constitutional rights to meaningful access to the courts, due process, and equal protection ("the constitutional claims"). Defendants moved to dismiss and/or for summary judgment raising a number of legal defenses.

The same court who refused to adjudicate the civil rights claims in Corcoran I barred the constitutional claims in Corcoran II-- solely on grounds of untimeliness. The court

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[5] The courts held that all claims accrued on diagnosis (3/20/95), Pet. App. at 148, except for Carrie's substantive due process claim for depriving her of her right to her father, which accrued upon his death (9/25/93). Id. at 151 n.21. In New York, the limitations period for claims under 42 U.S.C. § 1983 is three years. Id. at 146.

[6] In Corcoran I, the NYPA action was filed on 3/14/95; and the Westinghouse action was filed 9/21/95. Pet. App. at 33.

[7] Corcoran v. Sinclair, et al., No. 97 Civ. 9286 (DLC) (S.D.N.Y. Dec. 17, 1997).

ignored Petitioner's request for relation back of the claims against NYPA and Westinghouse ("the Entities") to Corcoran I even though the Entities had notice of the facts that supported both lawsuits. The opinion also failed to acknowledge that with relation back to the dates the Complaints were filed in Corcoran I, based on the undisputed facts, the civil rights claims against NYPA are all timely, and Carrie's individual claim against Westinghouse is also timely. See this Pet. supra, at 3 nn.5-6.

The court dealt its coupe de grace to Petitioner by censuring her for not knowing "the distinction between vigorous advocacy and indiscriminate, obsessive, and personalized litigation tactics." Pet. App. at 157. Respondents had moved for attorney's fees, costs and sanctions under Rule 11 of the Federal Rules of Civil Procedure, and for an order, pursuant to 28 U.S.C. § 1651, enjoining Carrie from further litigating claims against them. After thoroughly analyzing Respondents' motion and finding that there were no legal grounds for sanctions or an injunction, the court purported to deny the motion. Id. at 120-25. Nevertheless, the court warned Carrie that "any further litigation involving the same issues and/or parties will be considered frivolous and vexatious and may result in the issuance of injunctive relief, as well as an award of attorneys' fees." Id. at 125, 156. The court attempted to justify its warning by noting that Plaintiffs had filed "three separate lawsuits [counting Corcoran I as two]" each with "voluminous submissions, with extensive and repetitive motion practice" extending over a period of five years. Id. 167 n.14 .

On appeal in Corcoran I, the Second Circuit apparently recognized that the district court abused its discretion by refusing to consider the indisputably timely civil rights claims. In order to avoid disturbing legal precedent or reversing Judge Cote, the Second Circuit creatively evaded the issue by holding that it was moot because Corcoran II had already been dismissed "on the merits." Pet. App. at 85.

The constitutional claims in Corcoran II had been dismissed, but only on grounds of untimeliness, based on Corcoran II's filing date. If Plaintiffs were allowed to amend Corcoran I with relation back to the original filing dates, Plaintiffs would have timely civil rights claims. Thus, the issue was not moot. Shortly thereafter, the Second Circuit summarily affirmed the district court's decision in Corcoran II.

Summary of Facts

Eugene Corcoran died from chronic myeloid leukemia on September 25, 1993 at age fifty. Carrie was nineteen when she was appointed Executrix of his Estate. By the time she graduated from college, she knew that her father's death was not from natural causes.

Initially, it was Carrie's mother, Carol Ellis, who was convinced that radiation caused Gene's leukemia. Ellis found attorneys who agreed with her conclusion but she was unable to find one who was willing to litigate the case. Ellis appealed to her daughter, Carrie, a twenty-one year old woman who would soon enter the University of Pennsylvania Law School. Would she be willing to proceed pro se? Thinking about the roots of her father's illness and death always upset Carrie. Yet, she could not refuse the opportunity to try and vindicate the terrible wrongs her father had suffered. Working together, Carrie and her mother managed to uncover the circumstances surrounding Gene's radiation exposure, which ultimately led to his horrible and senseless death.

Uncovering the Cover-up

Gene never knew what caused his leukemia. He knew that radiation or chemical exposures can sometimes cause leukemia, but more often than not, the cause of leukemia is not known. Pet. App. at 147. He knew that in 1985 he had worked at Indian Point 3 Nuclear Power Plant ("IP3"), but he only worked there for two months, and only on the non-nuclear side of the plant where he was told that there was no

risk of danger from radiation exposure. Id. at 90. After his diagnosis, Gene made some inquiries through his union about possible chemical or radiation exposures, but he was unsuccessful in pinpointing the cause of his leukemia.[8]

After Gene died, Ellis read a newspaper article that informed her that the latency period for chronic myeloid leukemia exactly matched the length of time (eight years) between Gene's temporary job at IP3 in 1985, and his death in 1993. Compl.[9] ¶¶165-66. At this point, January of 1994, Ellis contacted a couple of attorneys who agreed to look into the matter on Carrie's behalf. Id. ¶167. One attorney, Henry Gluckstern, posted a notice at Gene's millwright union hall requesting information from anyone who knew about radiation leaks at IP3 in 1985. Id. ¶170.

Gluckstern also wrote to New York Power Authority ("NYPA"), a public authority and also the federal licensee of the IP3 plant. Id. ¶¶12-13, 169. Gluckstern requested information under New York's Freedom of Information Law ("FOIL") about Eugene Corcoran's work experience at IP3, in 1985. Id. ¶169. NYPA responded that it had no record that Eugene Corcoran ever worked or was present in any capacity whatsoever at IP3 in 1985, and it represented that its records for that time period were complete. C1's J.A.[10] 533, Admis. 67. Carrie knew the information was wrong. However, without any record of Gene's radiation dose, there was no basis for a claim that radiation exposure caused his death. By June of 1994, both attorneys informed Petitioner that they would no longer pursue their investigations. Compl., ¶171. Surprisingly, the matter did not end there.

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[8] The Second Circuit held that "[b]ecause Mr. Corcoran knew that his leukemia may have been caused by radiation exposure at IP3" under federal law his claims accrued on diagnosis. Pet. App. at 84.

[9] All references to the Complaint refer to Corcoran II's Complaint.

[10] "C1's J.A." is the Joint Appendix filed in Corcoran I's appeal.

On January 17, 1995, about a year after Gluckstein's notice was posted at the union hall, Ellis received a telephone call from Stephen Coli, a man who identified himself as having worked with Gene at IP3, in 1985. Pet. App. at 93. The men were hired by Westinghouse, NYPA's subcontractor, to perform maintenance on components in the turbine hall, which was on the non-nuclear side of the plant. Id. at 34. Coli recalled that shortly after he and Gene worked on a turbine stop valve, the area was surrounded with radiation warning tape. C1's J.A. at 172-178, Coli's Dep. Tr. Coli also recalled that he was sick on the job with non-stop vomiting and that Gene was sick, too. Id. at 145-147, 151. Yet, while working at IP3, Coli never worried about radiation exposure. He said, "I did sincerely thing that . . . if there was a hazard somebody would have brought it to our attention." Id. at 223.

Coli informed Ellis that after Gene's diagnosis with leukemia in 1992, Gene had called Coli to request his help in investigating the possibility that they were exposed to radiation at IP3 in 1985. Id. at 191. At the time of the telephone call, Coli was again working at IP3. He asked around for information about the 1985 outage. Id. at 193-96. But Coli's investigation came to an abrupt halt when Defendant Hugh Gilmartin overheard his inquiries and warned him not to "drag things up." Id. at 253. Coli testified that he understood Gilmartin to mean that "[the people at NYPA are] going to say something to the people I work for in Westinghouse and in turn I'm going to get laid off . . . . Because they don't want problems with a multi-million dollar contract over me asking some questions about an accident that happened." Id. at 248. After hearing this warning, the next time they spoke, Coli discouraged Gene from pursuing a claim by convincing him that nothing happened in 1985. Id. at 204.

After speaking with Coli, Ellis continued her investigation. She discovered that in the early eighties, NYPA had over 3000 leaks in their Westinghouse-

manufactured and-installed steam generator tubes-- the tubes that hold the radioactive water at IP3. C2's J.A. 578-79, Pls.' Expert's Aff. When steam generator tubes leak, contamination leaks into the steam that flows through turbine components-- the very components that the millwrights were hired to disassemble in 1985. Id. at 573.

Ellis also found other millwrights who recalled the time that the southwest (#32) stop valve was barricaded with radiation warning tape. C1's J.A. 133 ¶7, Steffens' Aff. The millwrights, who were working on a different shift than Mr. Corcoran, recalled witnessing a health physicist ("H.P.") circle the stop valve holding his Geiger counter eight to ten feet from the valve as it ticked loudly and rapidly. Id., 132 ¶4. The H.P. immediately left the site, but an hour later, other H.P.s arrived to inspect the stop valve. Id. ¶5. These H.P.s were all suited up in protective clothing and did not approach the stop valve until they removed their hard hats and donned hoods with facemasks with respirators. Id.

After learning these facts, Ellis again telephoned Gluckstern and convinced him to file a Complaint. C1's J.A. 857 ¶4, Gluckstern's Aff. Although Gluckstern "formed the opinion that Plaintiffs had a meritorious claim;" he decided not to represent Plaintiffs. Id. ¶3. Petitioner could not obtain any legal representation because NYPA failed to produce evidence that it was required to make and maintain under the federal regulations, see 10 C.F.R. Pt. 20. Compl. ¶178-79.

Under the regulations, Defendants owed a fiduciary duty not only to protect Gene from radiation, but also to provide him with information about his radiation dose. Defendants were required by the Nuclear Regulatory Commission's regulations to monitor a worker's radiation dose and to provide a health physicist ("H.P.") to survey components for radiation as workers disassembled the components. [11] The licensee also must maintain surveys for

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[11] Compl. ¶¶261, 210-21 (citing 10 C.F.R. §§ 20.202, 20.101, 20.201).

the life of the plant.[12] Despite these obligations, Defendants failed to monitor Gene's radiation dose, failed to timely survey components for radiation, and after radiation was discovered on components, failed to maintain the surveyreports documenting the levels of contamination. [13]

For instance, Westinghouse ordered Gene to work at the #32 stop valve. Pet. App. at 90. He worked there without personnel monitoring for six nights before the stop valve was finally surveyed and loose radioactive contamination was discovered. Id. at 90-91. Even then, Defendants did not offer radiation testing to determine his dose. Id. Rather, they assured the millwrights that they were in absolutely no danger and that testing was not required. [14]

After contamination was discovered at the #32 stop valve, Defendants barricaded it and cleaned off some of the contamination from the exposed external areas of the valve. Compl. ¶90. Then, Defendants removed the barricades and ordered Gene to continue disassembling the valve without personnel monitoring, despite the strong probability that contamination would be present at higher levels inside the valve. Id. ¶¶92-95, 101. After Gene worked at the stop valve another nine hours without protection, more contamination was found on the valve. Id. ¶¶96-98. The H.P. issued a stop work order; but Defendants overruled it and sent Gene to work at the stop valve still again. Id. ¶¶102-04. He removed the valve's shaft, again without monitoring and certainly without knowledge of the danger he faced. Id. ¶¶107-09. After his shift, the H.P. again discovered contamination at the stop valve; the shaft Gene had removed was removed from the site permanently. Id.

Before Gluckstern withdrew representation, he made FOIL requests for all surveys of turbine stop valves in June

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[12] Id., ¶¶238-39 (citing 10 C.F.R. §§ 20.401(b), 20.201(b), 20.401(c)).

[13] Id., Second, Fourth, Seventh Counts; C2 J.A. 572-74, Expert's Aff.

[14] C2's J.A. 571 (NYPA Representative's Dep. Tr.).

1985. C1's J.A. 857-58 ¶¶5-9 (Gluckstern's Aff.) NYPA's production was far from complete. Id. at 859 ¶¶11-13. About a year later, when pushed by Petitioner's allegations that she was missing a survey for the date that the stop valve was barricaded, NYPA finally produced another survey--one that reported the highest levels of radiation of any of the surveys thus far produced. C1's J.A. 535 Admis. 173.

Only after the conclusion of bifurcated discovery did Petitioner realize that she was still missing reports for surveys of the #32 stop valve. NYPA had failed to produce the survey reports for the dates when Westinghouse ordered Mr. Corcoran to continue disassembling the stop valve after the H.P. reported contamination. Compl. ¶240. The work logs unambiguously state that on those dates, the H.P. surveyed the valve and discovered contamination. Id. To cover-up the fact that reports are missing, NYPA falsely represented that certain other surveys were of the #32 stop valve, when in fact they were not. Id. ¶181.

Seven years later, on March 16, 1992, Gene was diagnosed with chronic myeloid leukemia. Pet. App. at 129. He underwent a bone marrow transplant and was hospitalized for 120 days. Id. at 130. On September 25, 1993, at age fifty, he finally succumbed to his leukemia. Id.

The Procedural History of Corcoran I

Defendants hired two major law firms to defend the Corcoran cases. On the other side, Petitioner had only herself and her mother (who has no formal legal training) to prosecute the case hoping to overcome enough of the legal hurdles to retain an attorney. C2's J.A. 287 ¶10 (Corcoran Decl.) Petitioner used her inheritance to cover legal costs, which have thus far amounted to tens of thousands of dollars. Id. Bifurcated discovery in Corcoran I lasted one year. Together, Petitioner and her mother interviewed forty-two witnesses, subpoenaed four witnesses for depositions, and also questioned six other witnesses subpoenaed by Defendants. Plaintiff responded to interrogatories and

requests for admissions and also served interrogatories and requests on Defendants. The parties also exchanged affidavits from their experts.

During the same year that discovery progressed, Plaintiffs opposed Defendants' motion to dismiss pursuant to Fed R. Civ. P. 12(b)(4), (5), and (6). Pet. App. at 1-3. The motion involved difficult de novo issues of law interpreting a federal cause of action that the Second Circuit had never before adjudicated. On July 29, 1996, the district court granted in part and denied in part Defendants' motion to dismiss. Id. at 31. The court held that Petitioner would be permitted to assert PLAs[15] derived from state law torts of negligence, fraud, battery and wrongful death but dismissed the PLAs based on violations of rights under Price Anderson's federal regulations. Id. at 13-22.

In October 1996, Defendants moved for summary judgment contending that the PLAs were barred by Mr. Corcoran's failure to file a state law notice of claim, by the statute of limitations, and by the worker' compensation law.

The District Court's Decision in Corcoran I

The court granted summary judgment for defendants in Corcoran I, holding that all of the PLAs were untimely. Pet. App. at 34. It held that under New York law, the negligence claims accrued on Mr. Corcoran's diagnosis with leukemia, and were barred because he failed to file a notice of claim with NYPA within ninety days of his diagnosis. Id. at 41.

The court held the PLAs against Westinghouse based on fraud and battery were barred by New York's battery statute of limitations --one year from the date of non-consensual

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[15] A "PLA" or "Public liability action," is "any suit asserting public liability." 42 U.S.C. § 2014 (hh). "Public liability" is "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. § 2014(w).

contact.[16] Id. at 48. The court rejected Plaintiffs' request for equitable estoppel of the timeliness defenses. Id. at 46-57.

The district court also held that the Westinghouse claims were barred under New York' Worker's Compensation Law. Id. at 48. However, upon reconsideration, the court withdrew this holding. Id. at 56.

The Reconsideration Motion in Corcoran I

Petitioner filed a timely Rule 59(e) motion arguing, among other things, that the Complaints also alleged facts that supported timely civil rights claims under 42 U.S.C. §§ 1983, 1985 and 1986. Plaintiffs requested leave to amend their Complaints to clarify their intent to pursue claims under a civil rights theory of recovery.

It took the district court more than six months to issue its opinion on the reconsideration motion. Id. at 50-51. Then, the court held that it was "simply too late" to allow plaintiffs to pursue civil rights claims because the court has already "carefully considered two substantial substantive motions in this case" and the parties had engaged in extensive discovery. Id. at 57-58. The district court did not mention that discovery had been bifurcated to the timeliness issues and that no further discovery was necessary to determine, that on the undisputed facts, Plaintiffs had timely civil rights claims. See this Pet., supra, at 3 nn.5-6.

In addition to holding that it was "simply too late" the district court attempted to justify its refusal to consider the civil rights claims in this case by noting that "[i]n any event, plaintiffs have filed a new action --[Corcoran v. Sinclair,] 97 Civ. 9286-- which raised some, if not all of these additional claims and in which a motion to dismiss is currently pending." Pet. App. at 58.

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[16] Under this rule, for his suit to be timely, Gene would have had to file it in 1986-- six years before his diagnosis with leukemia.

The Second Circuit's Decision in Corcoran I

The Second Circuit affirmed the dismissal of the PLAs against NYPA because Mr. Corcoran failed to file a state law notice of claim.[17] The Second Circuit also affirmed the district court's holding that the PLAs against Westinghouse for battery and fraud were time-barred under New York's one-year battery statute of limitations accruing upon non-consensual contact, even though the latency period for late radiation injury exceeds the statute of limitations. [18]

The remaining issue is the one for which Petitioner seeks writ of certiorari. On appeal, Petitioner argued that the district court abused its discretion when it summarily dismissed the Complaints without first considering the civil rights claims asserted therein, and without allowing Plaintiffs to amend their Complaints to clarify these claims. The Second Circuit disposed of this issue in one short paragraph. See Pet. Aff. at 85. First, it noted that Petitioner had commenced Corcoran v. Sinclair, (here "Corcoran II"). Then, the court erroneously stated that Corcoran II "was dismissed on the merits," and therefore, Petitioner's "challenge to Judge Cote's denial of leave to amend is moot." Id. The court refrained from further analysis. By mischaracterizing the record, the Second Circuit was able to

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[17] Pet. App. at 59-77. The court managed to dispense with the notice of claim issue without once mentioning Felder v. Casey, 487 U.S. 131 (1988), (holding that applying state law notice of claim immunities to federal claims violates the Supremacy Clause). Petitioner has not requested review of this unprecedented holding because NYPA is selling its nuclear plants. Only one other state with notice of claim privileges, Nebraska, has municipally owned nuclear plants.

[18] Id. at 77-80 (conspicuously omitting any citation to Owens v. Okure, 488 U.S. 235 (1989) which rejected the battery statute for claims under 42 U.S.C. § 1983, adopting instead, a single uniform limitations period from the state's general personal injury statute).

avoid the requirements of justice without setting any new precedents for which it would be held accountable.

Petitioner moved for rehearing and advised the panel that it had misapprehended certain facts that led to the erroneous finding that Petitioner's request to amend was moot. First, the Corcoran II court held Corcoran II was a suit only against the individual defendants, and not against the Entities. Second, the Corcoran II court dismissed the constitutional claims solely on timeliness grounds, based on Corcoran II's filing dates. If the same claims are considered in Corcoran I, and relate back to Corcoran I's filing dates, the claims are unquestionably timely. See supra, 3, nn. 5-6. Thus, there is a live controversy and Petitioner's request to amend Corcoran I is not moot. See Powel v. McCormack, 395 U.S. 486, 496 (1969) (discussing mootness). Petitioner's request for rehearing was denied. Pet. App. at 87.

Corcoran II

Petitioner filed Corcoran v. Sinclair, et al, 97 Civ. 9286 (DLC) ("Corcoran II") on December 17, 1997, while the Rule 59(e) motion in Corcoran I was pending. Id. at 133. The named Defendants are seventeen employees of NYPA and Westinghouse. See supra, at ii-iii. The face of the Complaint fails to specify the capacities in which the Defendants are sued. However, the Complaint supports claims against the named defendants in their individual capacities, Compl. ¶37, and also in their official capacities, id. ¶148.[19] In certain places in Defendants' Motion for Summary Judgment, they profess to read the Complaint only as an official-capacity suit. C2's J.A. 253-54. In other places, they recognize it as a suit against the individual employees. Id. at 255-56. In their opposition brief, Plaintiffs' stated their intention to sue

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[19] "Defendants' conduct complained of herein reflected the usual custom and practice of New York Power Authority and Westinghouse and the named Defendants who habitually violated the federal regulations enacted for the safety of nuclear plant workers." Compl., ¶148.

Defendants in both capacities and requested leave to amend the Complaint to clarify the suit. Id. at 266-68, 269-270.

Corcoran II alleges claims under 42 U.S.C. §§ 1983, 1985, and 1986. The § 1983 claims allege that, under color of state law, Defendants violated Plaintiffs' rights to procedural and substantive due process and equal protection under the United States Constitution. Pet. App. at 98. There is no need to discuss the § 1983 claims based on violations of statutory rights, or the §§ 1985 and 1986 claims, because Petitioner does not request review of the dismissal of those claims.

Defendants moved to dismiss Corcoran II on various grounds. Id. at 100. Plaintiffs cross-moved to amend their Complaint to clarify their intent to pursue claims against the named defendants in both individual and official capacities and to clarify other claims. Id. at 118. Plaintiffs' attached a proposed amended complaint with their motion. Id.

The Magistrate's Decision in Corcoran II

The district court referred the case to her magistrate for his Report and Recommendation. Id. at 133. The magistrate recommended that the civil rights claims be dismissed and Plaintiffs' request to amend be denied because all claims were precluded by Price Anderson and also time-barred. Id. at 101. He rejected Petitioner's request for relation back of the proposed claims against the Entities to Corcoran I because he held that Rule 15(c) does not permit relation back to a prior lawsuit. Id. at 119 n.22.[20] The magistrate rejected Defendants' res judicata defense because he found that Plaintiffs' civil rights claims could not have been brought as

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[20] The magistrate cites three cases for support. However, each of those cases did not relate back to the prior suit for reasons not present here. Bailey v. Northern Indiana Public Serv. Co., 910 F.2d 406, 413 n.9 (7th Cir. 1990) (new action based on different incident); Rayo v New York, 882 F. Supp. 37, 39 (N.D.N.Y. 1995) (party in new action not party in prior suit); GNK Enter., Inc. v. Conagra, 197 B.R. 444, 448-449 (Bankr. S.D.N.Y. 1996) (plaintiff in one suit was defendant in other).

part of their PLA. Id. at 108 n.14. Plaintiffs' filed objections to the magistrate's report, but Respondents did not object to any of the magistrate's recommendations. Id. at 133, 156.

The District Court's Decision in Corcoran II

The court said it was adopting the magistrate's report in its entirety, id. at 157, however, the district court's holdings differed from the magistrate's report. The magistrate held that Price Anderson precluded all Plaintiffs' § 1983 claims. Id. at 111. The district court held that the right to bring a PLA precluded the § 1983 claims based on statutory rights, but did not preempt Petitioner's § 1983 claims based on constitutional rights. Id. at 144-45.

The district court also held that Corcoran II, which was commenced on December 17, 1997, was time-barred. According to the court, all the civil rights claims (except Carrie's claim for depriving her of her father) accrued when Mr. Corcoran was diagnosed with leukemia on March 20, 1992, because on that date, Mr. Corcoran had sufficient knowledge "to believe that his leukemia may have been caused by radiation." Id. at 150. [21]

The court rejected Petitioner's request for relation back to Corcoran I. The court held that Rule 15(c) does not permit relation back to a prior action. Id. at 148 (citing Bailey, 910 F.2d at 413 n.9). The court held that additionally, although the facts alleged in both actions are virtually identical, "plaintiffs have sued new defendants in this action, and therefore, the defendants named herein were not on notice through the filing of Corcoran I . . . ." Id. at 149-50. The opinion did not acknowledge Petitioner's assertion that she intended to sue the named defendants in the official capacities-- which is the same as suing NYPA and Westinghouse. Later in the opinion, the court denied

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[21] Petitioner exercises restraint and does not request review of the accrual issue-- an issue too fact-bound for this Court's review.

Plaintiffs' request to amend Corcoran II to clarify her intent to sue the Entities, because the court said the amendment was futile because all claims against the Entities would be untimely. Id. at 155-56.

Motion for Sanctions

Defendants also moved for attorneys' fees, costs, and sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, and for an order under 28 U.S.C § 1651 enjoining Plaintiffs from further litigating claims for her father's injuries. Pet. App. at 120. Defendants accused Carrie of abusing the legal system by "filing repetitive and frivolous lawsuits that have absolutely no chance of success" and "resulted in vexation, harassment and needless expense" to "innocent individuals." Defs.' Br. in Supp. of their Mot. for Sanctions, at 4, 26. Defendants argued that "as a law school graduate and future officer of the court,"[22] Ms. Corcoran "should be sanctioned for her unprofessional conduct." Id. at 5, 21. "[B]ecause Ms. Corcoran shows no indication of abandoning her misguided vendetta, Defendants request an order enjoining Plaintiffs from commencing further litigation against them." Id. at 6.

The magistrate rejected Respondents' contentions that the Complaint contains the same arguments previously rejected in Corcoran I. Pet. App. at 122. Because the Magistrate found that there is meager direct legal authority on the issues, he also rejected Respondents' contentions that Petitioners' claims were frivolous. Id. at 123-24. The magistrate acknowledged that the merits of the claims were never reached, and thus, it could not be said that Plaintiffs lacked a reasonable evidentiary basis for their claims. Id. at 122-23. The magistrate found that "[w]hile plaintiffs have

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[22] Carrie graduated from the University of Pennsylvania Law School in May, 1998. She passed the July 1998 New York Bar Exam. Carrie's application for admission to the New York bar is currently pending.

been persistent -- perhaps even relentless" they have initiated essentially only two lawsuits and the history of the litigation in the instant case does not reflect the level of vexatiousness or harassment that has led courts in the Second Circuit to issue injunctions. Id. at 124.

Although he found I did nothing wrong, the magistrate nevertheless recommended punishing me with a warning. Id. 125-26. The only justification he offered for the warning was his sympathy for the defendants for the expenses they incurred in responding to these lawsuits, and "the dubious support for many of plaintiffs' claims." Id. at 125.

The district court adopted and cited the magistrate's recommended warning. Id. at 156. The court warned me that "any further litigation involving the same issues and/or parties will be considered frivolous and vexatious," and may result in the issuance of an injunction, sanctions, and attorney fees against me. Id. Judge Cote also quoted her magistrate with approval:

> [a]lthough proceeding pro se, as a young attorney embarking on her career, plaintiff should be sensitive to the distinction between vigorous advocacy and indiscriminate personalized litigation tactics.

Id. The court concluded the case with the statement: "the time has arrived for appellate review." Id. The opinion, however, never received any meaningful review. The Second Circuit summarily affirmed the district court's opinion in a table decision and denied Petitioner's request for panel rehearing. Pet. App. 160-61.

REASONS FOR GRANTING THE WRIT:

I. COURTS SHOULD BE REMINDED THAT EVEN IN THESE TIMES OF HEAVY CASE LOADS AND SCARCE JUDICIAL RESOURCES, IT IS STILL AN ABUSE OF DISCRETION TO DISMISS VIABLE CLAIMS AND ENJOIN PLAINTIFFS FROM FURTHER LITIGATION MERELY TO CLEAR THE DOCKET

The district court refused to adjudicate Plaintiffs' civil rights claims because it considered the Corcoran cases a burden on its judicial resources and believed it had already spent enough time adjudicating Plaintiffs' claims. See Pet. App. 55 (refusing to consider the civil rights claims because the court had already addressed legal claims that did not appear in the pleadings and had already considered "two substantial substantive motions"). For these same reasons, the court sanctioned Petitioner with a judicial warning not to file any further lawsuits. Id. at 147 (sanctioning Petitioner because she filed three separate lawsuits [the first two were consolidated into "Corcoran I"] and the litigations extended for over five years, with "voluminous submissions" and "extensive and repetitive motion practice").

There is no denying that Corcoran I and II are time-consuming cases to adjudicate. Corcoran I was the first PLA in the Second Circuit and it raised several de novo issues of law. The relevant facts span more than a decade and involve allegations of conspiracy and destruction of evidence. Defendants are able to afford talented attorneys who deny everything, concede nothing and used to their advantage the largely uninterpreted Price Anderson Act to raise every conceivable legal defense that could potentially prevent Petitioner's claims from being heard on the merits.

The courts' refusals to consider the civil rights claims belie their repeated pronouncements to construe pro se pleadings liberally. Petitioner's pro se status likely increased the difficulties in litigating these claims. Despite Petitioner's best efforts, her briefs were admittedly not as concise and

professional as they would be if she were well represented. It also took longer for her to grasp the legal significance of the facts. Nevertheless, the Framers of the First Judiciary Act, --the predecessor to 28 U.S.C. § 1654 (granting the right of self-representation to parties to a civil suit)-- anticipated that some confusion and delay would accompany self-representation. O'Reilly v. New York Times Co., 692 F.2d 863, 865 869 n.1, 7 (2d Cir. 1982). Yet, this is a price they thought well worth paying. Id. Although Carrie sought representation, she was unable to find an attorney to represent her because Defendants succeeded in frustrating her claims by intentionally concealing evidence. Compl. ¶¶164-183, 197-199. Under these circumstances, her delay in asserting the correct legal theory should not bar her claims.

We submit that if we are weighing burdens of litigating this case, Plaintiffs bore the greatest burden. Carrie dreaded the prospect of litigating her claims without an attorney. Id. ¶199. Nevertheless, she considered it her duty as her father's daughter and as a citizen to pursue these claims. C2's J.A. 287¶9 (Corcoran Decl.) She was offended by the government's abuse of power and by Defendants' total disregard for her father's life and she wanted to hold them accountable. Id. Carrie and her mother spent five harrowing years trying to understand the law fast enough, and well enough, to litigate these difficult claims. Carrie spent tens of thousands of dollars from her inheritance on depositions and expert fees alone. Id. ¶10. Despite the substantial money and effort Carrie invested in litigating her claims, the court prematurely dismissed the claims and deprived her of adjudication on the merits. Further, Carrie owes in excess of $7,000 for Defendants' bill of costs and has been sanctioned with a judicial warning for crimes she did not commit.

While this Court may be sympathetic to the district court's work load, it is not within the district court's discretion to frustrate prematurely a litigant's claim simply because the legal issues and facts are complex and require extra effort to litigate. By enacting federal remedies for civil

rights and radiation injuries, Congress, not the judiciary, decides who gets how much justice. Petitioner respectfully requests that the Court grant this writ, reverse the holding that it was "simply too late" for the court to consider plaintiffs' civil rights claims and the hold that the unjust sanction warning was an abuse of discretion.

II. THIS CASE PRESENTS A GOOD VEHICLE FOR RESOLVING THE CONFUSION IN THE LOWER COURTS ABOUT THE PROPER STANDARDS FOR CONSIDERING AND REVIEWING A RULE 59(E) MOTION FOLLOWING A GRANT OF SUMMARY JUDGMENT

Rule 59(e) of the Federal Rules of Civil Procedure requires that any motion to alter or amend the judgment must be filed "no later than 10 days after entry of judgment." Other than these time limits, the Rule provides no guidance for deciding whether to grant or deny the motion.

Most, though not all, circuits apply an abuse of discretion standard for reviewing a district court's decision on a Rule 59(e) motion following a grant of summary judgment. See School Dist. No. 1J v. Acands, 5 F.3d 1255, 1262 (9th Cir. 1993) ("abuse of discretion"); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (same); Collison v. International Chem. Workers Union, 34 F.3d 233, 236 (4th Cir. 1994) (same); Mackin v. City of Boston, 969 F.2d 1272, 1287 (1st Cir. 1992) ("clear abuse of discretion"); Global Network Techs. v. Regional Airport Auth., 122 F.3d 661, 665 (8th Cir. 1997) (same); but see Koppers Co. v. Aetna Cas. and Sur. Co., 98 F. 3d 1440, 1445 (3d Cir. 1996) (using summary judgment standard to review grant of summary judgment and denial of Rule 59(e) motion; Keweenaw Bay Indian Comm. v. United States, 136 F.3d 469, 474 (6th Cir. 1998) ("We typically review denials of [Rule 59(e)] motions for abuse of discretion but where a Rule 59(e) motion seeks reconsideration of a grant of summary judgment . . . we conduct a de novo review.") .

The question is not resolved simply by determining the standard of review. A wide disparity exists in the factors that bear upon a court's decision to reconsider a grant of summary judgment. See Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993) (collecting cases showing lack of uniformity in deciding what circumstances justify considering new evidence submitted in a reconsideration motion following a grant of summary judgment). For instance, the Seventh Circuit's position is that motions for reconsideration should not be used to advance novel legal arguments except to correct "manifest error or law." Russell v. Delco Remy Div. of Gen. Motors Corp., 51 F.3d 746, 749 (7th Cir. 1995); see also Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 330 (8th Cir. 1993) (same); O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992) (same). On the other hand, the Fifth Circuit holds that a party bringing a Rule 59(e) motion introducing new evidence is not required to show mistake, inadvertence, surprise or excusable neglect or that the judgment was manifestly wrong. Ford, 32 F.3d 931, 937 (citing Lavespere, 910 F.2d at 174) (5th Cir.) (holding court must weigh need to bring litigation to an end and need to render just decisions on the basis of all the facts). The D.C. Circuit finds that a proper exercise of discretion requires the district court to provide valid reasons for refusing a Rule 59(e) motion and a Rule 15(a) motion to amend the Complaint. See Firestone, 76 F.3d at 1208-09 (D.C. Cir.) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Even circuits with strict standards of review recognize that certain factors weight heavily on the side of granting a Rule 59(e) motion. See, e.g., Russell 51 F.3d at 751-52, n.2 (considering plaintiffs uncounseled status, and court's failure to inquire into well-known legal standard); Mackin, 969 F.2d at 1279 (due diligence and likelihood of success, weigh heavily in balance); Collison, 34 F.3d at 236-37 (holding court abused discretion in refusing to adjudicate issue because courts have obligation to resolve justiciable

causes of action); Ford, 32 F.3d at 937-38 (5th Cir.) (considering reasons for plaintiffs' default, importance of the evidence, whether it was previously available to plaintiffs, and likelihood that defendants will suffer prejudice if case is reopened).

The Court of Appeals in the instant case avoided stating the standard of review by pretending that the issue was moot. There is, however, precedent from the Second Circuit for reviewing a Rule 59(e) motion de novo, in accordance with the standard of review for the underlying summary judgment motion. See Lowrance v. C.O. S. Achtyl, 20 F.3d 529, 534 (2d Cir. 1994). If Petitioner's Rule 59(e) motion were reviewed de novo, clearly she would be entitled to adjudication of her civil right claims, because her argument is dispositive on the summary judgment issue-- whether Plaintiffs have timely claims. In fact, Corcoran I violates any reasonable standard of review. Not only is Petitioner's Rule 59(e) motion outcome determinative on the issue, other factors favor reconsidering the case. Petitioner's diligence is undisputed. See Pet. App. at 124 (describing Petitioner as "persistent" and "relentless" in the pursuit of her claims). Not only is Petitioner pro se, she is pro se by necessity, because Defendants' succeeded in frustrating her claims. See this Pet. supra, at 20. These factors should outweigh her delay in raising the civil rights theory of recovery.

Courts also consider prejudice to the defendants. Respondents made a conclusory claim of prejudice in their appellate brief. Appellees' C1 Br. at 47-48 (raising civil rights claims after discovery was concluded "compounds the existing prejudice to Defendants' ability to litigate the case"). Yet, Respondents were unable to articulate how they were prejudiced. No prejudice exists because there is no need to reopen discovery to determine the timeliness of the § 1983 claims. The courts held that the facts relevant to accrual of the § 1983 claims and the PLAs are identical and that both the PLAs and the § 1983 claims accrued on the same dates. Pet. App. at 84, 122, 150-151 n.21. Respondents incurred no

additional expense from the delay in asserting the civil rights theory of recovery. Even if Petitioner had asserted her § 1983 claims in her original Complaints, the timeliness of the PLAs still had to be litigated to determine whether Respondents deprived Petitioner of meaningful access to the courts for her PLAs. Vacating the dismissal of the case and adjudicating the civil rights claims will delay resolution of the case simply because the case will go forward and examine other issues. This causes no additional burden other than the burden Respondents would have borne had the § 1983 claims been asserted in the original complaints. This type of burden does not outweigh Rule 15(a)'s policy favoring adjudication on the merits. S.S. Silberblatt v. East Harlem Pilot Block, 608 F.2d 28, 43 (2d Cir. 1979).

In sum, granting this writ will resolve an important and recurring issue and resolve the confusion in lower courts concerning the factors to be considered when deciding a Rule 59(e) motion following a grant of summary judgment. This Court may view the differences among the circuits as narrow. However, these differences are anything but narrow to the litigant who, within ten days of entry of summary judgment, realizes that her meritorious claims were dismissed because she erred in presenting her case. Resolving this conflict will limit the unfairness that results from the disparate treatment that the courts give this issue. This case presents a good vehicle for settling the confusion regarding the proper interpretation of Rule 59(e) because many of the factors worthy of consideration are present here.

III. SUMMARY REVERSAL IS WARRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CANNOT BE SUPPORTED WITHOUT MISREPRESENTING THE RECORD AND DISREGARDING THE LAW

The opinions below are completely dependent on erroneous statements of the record and the evince disregard for the Federal Rules and the law established by this Court. Therefore, in accordance with Rule 16.1 of this Court, the

opinions should be summarily reversed on the issues presented in this Petition and the civil rights claims should be remanded for consideration. The following errors warrant summary reversal by this Court:

1. The Corcoran I court ignored Rule 15(a), which provides that leave to amend the complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This Court has held that leave to amend should be granted, in the absence of bad faith, or unless the adverse party will be prejudiced. Foman v. Davis, 381 U.S. 178, 180-82 (1962). In Foman, the fact that the plaintiff waited until her Rule 59(e) motion to request leave to amend her complaint, did not justify denying her request. Id. Here, the courts have not found bad faith and Respondents have not demonstrated any prejudice. See supra at 23-24. The court is not justified in refusing to allow amendment of the Complaint just because it finds Petitioner's claims a burden.

2. By denying Petitioner's request to amend Corcoran I to add civil rights claims, the court below ignored Rule 15(b) and this Court's teachings that permit amendment of the pleadings to conform to the evidence-- even after a trial has been concluded and judgment has been entered.[23] See Brandon v. Holt, 469 U.S. 464 , 471 & n.19 (1985) (citing Fed. R. Civ. P. 15(b); 3 J. Moore, Federal Practice ¶15.13[2], (2d ed 1984) (amendment to conform to evidence may be made at any time)) (other citations omitted). In Corcoran I, summary judgment was granted following bifurcated discovery limited to the timeliness of Petitioner's claims. The courts held that all plaintiffs' claims accrued on diagnosis (3/20/92), except for Carrie's claim for loss of her father, which accrued upon his death (9/25/93). Pet. App. at 148, 151 n.21. The limitations period for Petitioner's § 1983

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[23] The party's right to amend is conditioned on a finding that the opposing party has not been prejudiced in presenting his case. As discussed supra, this Pet. at 24, Petitioner's delay did not prejudice Respondents in presenting their statute of limitations defense.

claims is three years. Id. at 146. The NYPA action was filed on 3/14/95, the Westinghouse action on 9/21/95. Id. at 146. Thus, all Plaintiffs' § 1983 claims against NYPA are timely, as is Carrie's claim against Westinghouse for loss of her father. The court violated Rule 15(b) by not allowing Petitioner to amend Corcoran I to conform to the proof.

3. The Second Circuit lacked a valid legal reason for not reversing the district court's decision denying leave to amend Corcoran I. Yet, the Second Circuit managed to sanction the district court's abuse of discretion by twisting Corcoran II's record to support the panel's conclusion that Petitioner's request to amend was moot. Pet. App. at 85. First, the Second Circuit in Corcoran I characterized Corcoran II as a claim against "NYPA, Westinghouse, and several individual defendants" despite the fact that the Corcoran II courts construed it only as a case against individuals. See supra at iii (comparing Pet. App. at 66, 85, with 102-03, 149). Then, Corcoran I erroneously stated that Corcoran II was dismissed on the merits. In fact, Corcoran II dismissed the § 1983 constitutional claims only because they were time-barred under Corcoran II's filing date. Id. at 151. The Corcoran I court also ignored the fact that Petitioner has timely § 1983 claims under Corcoran I's filing dates. See supra, at 3 nn.5-6. By disingenuously portraying the record, the Second Circuit conveniently found that there was no need for the court to address on appeal in its published decision, the reason the decision denying Petitioner's request to amend Corcoran I should not be reversed.

4. The Corcoran II courts denied Plaintiffs' request for relation back of the civil rights claims against the Entities to Corcoran I because the court construed Corcoran II as a suit only against individuals who were not on notice with the filing of Corcoran I. Pet. App. at 149-50. The courts turned a deaf ear to Petitioner's argument that the Complaint does state claims against the Entities and that she had every intention of suing the defendants in their official capacities. See supra, at 24 n.19. The courts disregarded this Court's

precedents, not to mention its own precedent, which hold that courts look to the nature of the proceeding to determine the liability to be imposed. Frank v. Relkin, 1 F.3d 1317, 1326 (2d Cir. 1993) (citing Kentucky v. Graham, 473 U.S. 159, 167 n.4 (1985) (quoting Brandon v. Holt, 469 U.S. 464 , 469 (1985)). A plaintiff who has not clearly identified on the face of the complaint the capacity in which she is suing defendants should be given the opportunity to clarify her intent and amend her complaint. Frank, 1 F.3d at 1326.

5. The court denied Petitioner's request to amend Corcoran II to clarify her intent to sue the Entities. It held the request was futile because the claims were untimely. Pet. App. at 156-57. In order to maintain the appearance of a well-reasoned opinion, the court omitted the incontestable fact that if claims against the Entities related back to Corcoran I's filing dates, Petitioner had timely § 1983 claims.

6. The courts held that Corcoran II could not relate back to Corcoran I because Rule 15 does not permit relation back to a separately filed lawsuit. This holding is neither supported by the text of the rule [24] nor by the policies behind it. [25]

Rule 15(c)'s rationale is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statute of limitations were

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[24] "An amendment of a pleading relates back to the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." See Rule 15(c)(2) (emphasis added), Pet. App. at 165.

[25] See Bornholdt v. Brady, 869 F.2d 57, 69 (2d Cir. 1989) (holding complaint related back to earlier dismissed lawsuit because "linchpin of relation back is notice within the limitations period"); Lerman v. Chuckleberry, 544 F. Supp. 966, 969 (S.D.N.Y. 1982) (holding plaintiff not precluded from benefiting from the liberal relation-back provisions of Rule 15(c) simply because she commenced separate action).

intended to provide. Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 n.3 (1984) (citation omitted). Corcoran I informed the Entities of the conduct upon which the § 1983 claims are based. The same law firm represented both the Entities and the individual Defendants and knew that Petitioner tried to assert the § 1983 claims against the Entities in Corcoran I. Respondents cannot have relied on the policy of repose embodied in the statute of limitations when it was aware that Petitioner was actively pursuing her claims. Burnett v. New York Cent. R.R., 380 U.S. 424, 429-30 (1965). Petitioner's filing of Corcoran I showed the proper diligence that statutes of limitations were intended to insure. Id. (citing Goldlawr v. Heiman, 369 U.S. 463, 467 (1962)). Even when a lawsuit is filed in a court that lacks personal jurisdiction over the defendant, the Court has held that the filing shows the proper diligence and thereby tolls the statutes of limitations. Goldlawr, 369 U.S. at 467. Thus, Corcoran II's holding denying relation back of the claims against the Entities to Corcoran I's filing dates, is so contrary to Rule 15(c) and the policies embodied in the statute of limitations, that this Court should summarily reverse it.

7. The courts below recognized that Respondents' Rule 11 allegations were wholly untenable, and even if true, could never justify Respondents' request for an order, under 28 U.S.C. § 1651, enjoining Petitioner from further litigation. Pet. App. 120-26; 156. The district court purported to deny Respondents motion for sanctions and an injunction. Nonetheless, the court irrationally proceeded to sanction Petitioner, by reprimanding her and infringing on her right to bring further litigation against Respondents. Rule 11 provides for sanctions in the form of "directives of a nonmonetary nature." Rule 11(c)(2), Pet. App. at 162. However, Rule 11 does not support the courts' sanction warning because the Rule only allows imposition of a sanction if the court determines that subdivision (b) was violated. Id. at (c)(1)(A). Because the courts did not find that Petitioner violated subdivision (b), the court had no

legal basis for sanctioning Petitioner. The court offered no other legal basis for the sanction. The magistrate relied on his sympathy for the expense Respondents incurred in defending these lawsuits and the district court relied on the burden these claims placed on the court's workload. The courts abused their discretion by relying on these factors. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (holding court abuses discretion when ruling is based on erroneous view of law).

CONCLUSION

This Court has said, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman, 381 U.S. at 182. We ask this Court to exercise its power of supervision under Sup. Ct. R. 16, summarily reverse the decisions that held Petitioner's § 1983 claims against NYPA and Westinghouse were untimely or asserted "simply too late" for the court's consideration, and remand the cases to afford Petitioner the opportunity to have her claims heard on the merits. Further, we ask this Court to summarily reverse the federal court's sanction warning that unfairly impugns Carrie's reputation as she is embarking on her career as an attorney. At the very least, this Petition should be granted to answer the questions presented and to address the confusion over the proper standards for considering and reviewing a Rule 59(e) motion following a grant of summary judgment.

Respectfully submitted this 6th day of March, 2000.

Carrie Corcoran

Carrie Corcoran, Petitioner Pro Se,
8297 South Ridge Drive
Macungie, Pennsylvania 18062
(610) 965-5766 (212) 373-3377

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Carrie CORCORAN, as executrix of the estate of Eugene Corcoran, deceased, and Carrie Corcoran, Individually, Plaintiffs,

v.

NEW YORK POWER AUTHORITY and Wedco Corp., Defendants.

Carrie CORCORAN, as executrix of the estate of Eugene Corcoran, deceased, and Carrie Corcoran, Individually, Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORP., Defendant.

Nos. 95 CIV. 5357 (DLC), 95 CIV. 8102 (DLC).

United States District Court,
S.D. New York.

July 29, 1996.

*381 Carrie Corcoran, Macungie, PA, pro se.

Sheila L. Birnbaum, Peter J. McKenna, Wendy Fleishman, Skadden, Arps, Slate, Meagher & Flom, New York City, for Defendants.

OPINION

COTE, District Judge:

Carrie Corcoran, on her own behalf and as Executrix of Eugene Corcoran's estate ("plaintiffs"), filed this action in state court on March 15, 1995. Defendants removed the action and now move to dismiss all of plaintiffs' claims. For the reasons set forth below, the motion is granted in part and denied in part.

PROCEDURAL BACKGROUND

Plaintiffs, then represented by counsel, filed a lawsuit in New York Supreme Court on March 15, 1995, against defendants New York Power Authority ("NYPA") and WEDCO Corporation ("WEDCO") (the "NYPA action"). Following counsel's withdrawal from the case, the plaintiffs proceeded pro se by serving the Summons and Complaint on June 30, 1995, on defendant NYPA and (although the legal sufficiency of service is contested by WEDCO, see infra) on WEDCO by delivery of said papers to Prentice-Hall, Westinghouse Electric Corporation's ("Westinghouse") registered agent. Defendants removed this action, pursuant to 42 U.S.C. § 2210, on July 18, 1995.

Thereafter, NYPA and WEDCO moved, on August 14, 1995, to dismiss the entire NYPA action pursuant to Rule 12(b)(4), (5), and (6), Fed.R.Civ.P. In response, the plaintiffs filed a motion on September 5, 1995, "to estop defendant, New York Power Authority, from asserting an affirmative defense regarding the statute of limitations on the plaintiffs' notice of claim or plaintiffs' action" (the "Estoppel motion"). On September 21, 1995, plaintiffs filed an Amended Complaint in the NYPA action and filed a new and separate action against Westinghouse (the "Westinghouse action"). In response to the Estoppel motion, the NYPA cross-moved for summary judgment on September 25, 1995, arguing that plaintiffs' claims against NYPA are barred by the deceased's failure to file a timely notice of claim. [FN1] Plaintiffs responded to the Rule 12 motions on September 27, 1995, and also sought leave of Court to substitute Westinghouse for WEDCO or, in the alternative, an order consolidating the NYPA and Westinghouse actions. This Court entered an Order consolidating both actions on November 7, 1995. On December 1, 1995, NYPA, WEDCO, and Westinghouse (collectively, the "defendants") moved to dismiss the Amended Complaint and the Complaint in the Westinghouse action pursuant to Rule 12(b)(4), (5), and (6),

Fed.R.Civ.P. On December 27, 1995, an Amended Complaint was filed in the Westinghouse action (the "Amended Westinghouse Complaint"). Plaintiffs also filed a Second Amended Complaint in the NYPA action on January 17, 1996. [FN2] Defendants filed the instant motion to dismiss the Second Amended Complaint and the Amended Westinghouse Complaint on January 11, 1996.

> FN1. This Court held an initial pretrial conference on October 6, 1995, and, inter alia, heard argument that the action against Westinghouse may be barred by the statute of limitations. The Court ordered the parties to proceed with discovery on the notice of claim and, if necessary, the statute of limitations issues. As the Court informed the parties at the conference, at the conclusion of discovery the parties may submit additional briefing to complete the summary judgment motion. Such discovery is due to be completed on September 15, 1996; the supplemental briefing will be completed on October 15, 1996.

> FN2. These amended pleadings were served on the defendants on December 21, 1995.

FACTS

The facts as alleged in the Second Amended Complaint and the Amended Westinghouse Complaint are assumed to be true for the purposes of the 12(b)(6) motion and are as follows. In June 1985, the deceased plaintiff, Eugene Corcoran, was employed by Westinghouse as a millwright. Between ***382** June and August 1985, Mr. Corcoran was assigned to do maintenance work at NYPA's Indian Point 3 nuclear power plant (hereinafter, "IP3"). His assignments included working on the steam turbine and associated steam supply system serving IP3, including an area called the "stop valve." Plaintiffs allege that at the time Mr. Corcoran

worked near the stop valve, the steam generator tubes that carried radioactive water were defective and/or corroded, cracked, broken or split, thereby causing leakage of radioactive substances and particles that were deposited in the stop valve. Although NYPA and Westinghouse were aware that the area around the stop valve had been dangerously contaminated by radiation, they "failed to timely alert and warn" Mr. Corcoran. Mr. Corcoran wore no protective clothing and had no equipment to guard him against or alert him of the presence of radiation; consequently, he was exposed to the contaminated stop valve at radiation levels "in excess of applicable regulatory standards." After Mr. Corcoran had worked in the stop valve area "for some time," NYPA surveyed and detected the contamination yet still "failed to immediately barricade the area and post radiation warning signs to prevent unsuspecting persons from entering upon the area." Mr. Corcoran, therefore, was unaware of the contaminated state of the stop valve and continued to work near the stop valve and to be exposed to radiation after NYPA's discovery of the dangerous condition. Following his exposure to the contaminated stop valve, Mr. Corcoran fell ill in June 1985, suffering the effects of "acute radiation sickness." At the time, however, his symptoms were not diagnosed as resulting from radiation exposure, and Mr. Corcoran was unaware that his illness was caused by radiation. Although defendants were aware of the seriousness of the contamination, they made no efforts to provide Mr. Corcoran with medical treatment.

For several years following his work at the IP3 stop valve, Mr. Corcoran "continued to suffer from debilitating illnesses of unexplained etiology and was hospitalized." On March 16, 1992, Mr. Corcoran was admitted to Mid Island Hospital in Bethpage, New York. He was subsequently diagnosed as having "acute/chronic myeloid leukemia, a fatal disease of the body's blood and immune systems which is brought on by excessive exposure to nuclear radiation." Mr. Corcoran

died on September 25, 1993. To date, plaintiffs are unaware of the degree of Mr. Corcoran's actual exposure to radiation.

The following undisputed facts are derived from documents beyond the pleadings and shall be considered with respect to the motions to dismiss WEDCO as a defendant in this litigation. In their first Rule 12 motion, defendants attached the affidavit of Cheryl M. Hays, a Westinghouse Manager, who attests that WEDCO was incorporated in the State of Delaware and at all times was a wholly-owned subsidiary of Westinghouse until it was dissolved on May 2, 1978. Hays attests that "[a]t no time has any court entered an order extending WEDCO's capacity to be sued under Delaware Code Annotated 278, 279 or any other provision of law." Hays further attests that "[a]ll of the assets of WEDCO were distributed on or about the time of its dissolution and no assets remain undistributed."

RULES 12(b)(6) AND 56 STANDARDS

[1][2][3][4] The Court may dismiss an action pursuant to Rule 12(b)(6), Fed.R.Civ.P., only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir.1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). In considering the motion, the Court must take "as true the facts alleged in the complaint and draw[ ] all reasonable inferences in the plaintiff's favor." Jackson National Life Insurance Co. v. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir.1994). The Court can dismiss the claim only if, assuming all facts alleged to be true, plaintiff still fails to plead the basic elements of a cause of action. Finally, a pro se complaint such as this one is held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972); Branham v. Meachum, 77 F.3d 626, 628-29 (2d Cir.1996).

*383 [5][6][7][8] Although the defendants have moved to dismiss the claims against WEDCO pursuant to Rule 12(b)(6), Fed.R.Civ.P., a court may convert a motion to dismiss into a motion for summary judgment under Rule 56, Fed.R.Civ.P., when "matters outside the pleading are presented to and not excluded by the court." Rule 12(b), Fed.R.Civ.P. A district court may not so convert a motion under Rule 12(b), however, "without sufficient notice to an opposing party and an opportunity for that party to respond." Groden v. Random House, Inc., 61 F.3d 1045, 1052 (2d Cir.1995) (citing In re G. & A. Books, Inc., 770 F.2d 288, 294-95 (2d Cir.1985), cert. denied, 475 U.S. 1015, 106 S.Ct. 1195, 89 L.Ed.2d 310 (1986)). Thus, to determine whether a district court may properly convert a motion to dismiss into one for summary judgment,

> "The essential inquiry is whether the [party] should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings."

Groden, 61 F.3d at 1052-53 (quoting In re G. & A. Books, Inc., 770 F.2d at 295). However, "[n]otice is particularly important when a party is proceeding pro se and may be unaware of the consequences of his failure to offer evidence bearing on triable issues." Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 767 (2d Cir.1983) (citing cases). Plaintiffs were served with defendants' first Rule 12 motion, which included the Hays affidavit, in August 1995. In response, plaintiffs sought in their September 27, 1995, reply memorandum to substitute Westinghouse for WEDCO, pursuant to Rule 15, Fed.R.Civ.P. Plaintiffs renewed their application through their memorandum of law opposing the instant motion to dismiss. Thus, plaintiffs have had ample notice and a " 'reasonable opportunity to meet facts outside

the pleadings.' " Groden, 61 F.3d at 1052-53. Therefore, converting the motion into one for summary judgment is appropriate.

[9][10] Summary judgment is appropriate only when the submissions of the parties, taken together, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. When deciding a motion for summary judgment, the Court must "view the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in its favor." American Casualty Co. of Reading, Pennsylvania v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir.1994). In addition, because plaintiff is acting pro se, the Court must "read [plaintiff's] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994); accord Soto v. Walker, 44 F.3d 169, 173 (2d Cir.1995).

DISCUSSION

A. Public Liability Actions Under the Price-Anderson Act

1. Statutory and Regulatory Framework

[11] The parties agree that a "public liability action" ("PLA") pursuant to 42 U.S.C. § 2210(n)(2) of the 1988 amendments to the Price-Anderson Act is the plaintiffs' exclusive right of action. The principal issues are first, the extent to which a PLA preempts plaintiffs' personal injury and related state law claims and, as defendants contend, limits plaintiffs to one single cause of action, and second, the extent to which federal law determines the standard of care in plaintiffs' PLA claims.

[12] A brief historical account of the 1988 Price-Anderson Act Amendments is appropriate. Congressional regulation of nuclear power began with the Atomic Energy Act of 1946, 60 Stat. 755, which designated the nuclear industry a government monopoly. See In re TMI, 67 F.3d 1103, 1107 (3d Cir.1995) ("TMI III "). The road was paved for private sector involvement, however, with the enactment of the Atomic Energy Act of 1954, 68 Stat. 919, which substituted complete federal control over the nuclear industry with more familiar regulatory means, such as licensing. Id. The danger of staggering liabilities associated with nuclear power accidents slowed the entrance into the *384 nuclear energy field of private industry and convinced Congress of the need for further legislation, resulting in the Price-Anderson Act, 71 Stat. 576 (1957) (the "Act"). The Act provided federal funds to help pay damages caused by nuclear accidents, and it also limited the potential civil liability of nuclear plant operators. TMI III, 67 F.3d at 1107. The Act, therefore, "had a dual purpose: 'to protect the public and to encourage the development of the atomic energy industry.' " Lujan v. Regents of the University of California, 69 F.3d 1511, 1514 (10th Cir.1995) (citing 71 Stat. at 576, codified at 42 U.S.C. § 2012(i)). The Act had three main features:

> 1) It "established a limit on the aggregate liability of those who wished to undertake activities involving the handling or use of radioactive materials"; 2) It channelled public liability resulting from nuclear incidents to the federal government; and 3) It established that all public liability claims above the amount of required private insurance "protection would be indemnified by the Federal Government, up to the aggregate limit on liability."

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1095 (7th Cir.1994) (quoting S.Rep. No. 218, 100th Cong., 1st Sess. 2 (1987), reprinted in 1988 U.S.C.C.A.N. 1424, 1476, 1477)).

The Act has been amended three times. The 1966 Amendments, inter alia, provided for the transfer to federal

district courts of all claims arising out of an "extraordinary nuclear occurrence" ("ENO") [FN3]. See O'Conner, 13 F.3d at 1095. Concerned by the unsettled state of state tort law dealing with liability for nuclear incidents, and motivated by a desire to create greater uniformity, the 1966 Amendments also provided that those indemnified under the Act waive common law defenses in the event of an ENO, which essentially created a "strict liability" system for such disastrous events.

> FN3. An ENO is defined as an event in which nuclear-related materials are discharged offsite (or cause offsite radiation) and which the Nuclear Regulatory Commission ("NRC") or the Secretary of Energy "determines to be substantial" and "has resulted or will probably result in substantial damages to persons offsite or property offsite." 42 U.S.C. § 2014(j).

[13] The Act was most recently amended in 1988 to provide "a mechanism whereby the federal government can continue to encourage private sector participation in the beneficial uses of nuclear materials." TMI III, 67 F.3d at 1108 (quoting In re TMI Litigation Cases Consolidated II, 940 F.2d 832, 853 (3d Cir.1991) ("TMI II ")). Congress was satisfied that

> [t]he Price-Anderson System ... provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards of recovery that might otherwise be applicable under State tort law.

O'Conner, 13 F.3d at 1095 (quoting S.Rep. No. 218 at 4). To this end, federal district court jurisdiction was extended beyond ENOs to include all "nuclear incidents"; [FN4] the 1988 Amendments Act also provided for the removal of state court actions (including those pending in state court at the time of the passage of the 1988 Amendments Act), and allowed their consolidation into a single, federal court

proceeding. See 42 U.S.C. § 2210(n)(2); § 2210(n)(3) (providing for the appointment of a special caseload management panel that, inter alia, has powers "to consolidate related or similar claims for hearing or trial"). In addition, a new federal right of action was created--the PLA. Defined as "any suit asserting public liability," 42 U.S.C. § 2014(hh), a PLA encompasses (with exceptions not relevant to the instant action) "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. § 2014(w) (defining "public liability"). Given the breadth of the PLA's definition,

> FN4. "Nuclear incident" is defined, in relevant part, as any occurrence [including an ENO] within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.
> 42 U.S.C. § 2014(q).

the consequence of a determination that a particular plaintiff has failed to state a ***385** public liability claim potentially compensable under the Price- Anderson Act is that he has no such claim at all. After the [1988] Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all.... At the threshold of every action asserting liability growing out of a nuclear incident, then, there is a federal definitional matter to be resolved: Is this a [PLA]? If the answer to that question is "yes," the provisions of the Price-Anderson Act apply; there can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the [PLA].

TMI II, 940 F.2d at 854-55 (emphasis in original).

[14] Although a PLA became the sole means by which a plaintiff could recover for damages sustained in a nuclear incident, Congress determined that the source for the substantive law underlying a PLA would be state law. Congress expressly stated that a PLA

> shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. § 2014(hh) (emphasis supplied). [FN5] Congress, however, also set forth various federal requirements to a PLA, including a limitations period, see 42 U.S.C. § 2210(n)(1), venue, see 42 U.S.C. § 2210(n)(2), choice of law, see 42 U.S.C. § 2014(hh), an upper limit of aggregate liability and limits on the availability of punitive damages, see 42 U.S.C. §§ 2210(e) and (s). In summary, as the Seventh Circuit has recently put it, the 1988 Amendments Act

> FN5. Section 2014(hh) "was designed to overturn decisions in which the Third Circuit had held that 'federal courts do not have subject matter jurisdiction for claims arising out of a non-ENO nuclear incident.' " O'Conner, 13 F.3d at 1096 (quoting S.Rep. No. 218 at 13 (citing Stibitz v. GPU, 746 F.2d 993 (3d Cir.1984), cert. denied, 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985)). Accord TMI II, 940 F.2d at 857 (the 1988 Amendments Act is "the clearest expression of intent that there be a federal cause of action arising directly under the Act").

> is the latest installment in nearly fifty years of congressional work. During that time, Congress has attempted to encourage the development of domestic nuclear power to the fullest extent through licensing, indemnification, limitation of liability, and consolidation of litigation. Nevertheless, Congress has balanced this encouragement of private sector activity with an acute concern for public safety by authorizing extensive regulation ... and by imposing a carefully constructed measure of liability should nuclear incidents occur.

O'Conner, 13 F.3d at 1096-97.

The parties do not dispute, and I also find, that the action alleged falls squarely within the definition of a PLA. The defendants contend, however, that all of plaintiffs' claims are preempted by the Act, such that the plaintiffs can only assert one single cause of action--the PLA. According to the defendants, the elements of this cause of action which plaintiff must allege are (1) that defendants breached their duty of care by permitting the decedent to be exposed to an amount of radiation in excess of the limits set forth in 10 C.F.R. § 20.101; and (2) that the exposure in excess of the limits set forth in 10 C.F.R. § 20.101 was the proximate cause of the injury alleged. Plaintiffs counter by arguing that the Act, as amended, (1) does not preempt the state law claims asserted against defendants; (2) the occupational dose limits set by 10 C.F.R. § 20.101 do not represent the sole duty that was owed Mr. Corcoran, because "all of the federal regulations concerning the nuclear industry provides [sic] a duty of care," including the "as low as reasonably achievable" ("ALARA") standard set forth in 10 C.F.R. § 20.1.

[15][16][17] The mere fact that all causes of action arising out of a "nuclear incident" are federal in nature does not eliminate plaintiff's ability to assert claims the rules of decision of which are derived from state law. Indeed, as

noted above, Section 2014(hh) explicitly provides that "the substantive rules for decision ... *386 shall be derived from" state law. Consequently, "only those theories of relief that are inconsistent with [the provisions of Section 2210] need be dismissed." Bohrmann v. Maine Yankee Atomic Power Co., 926 F.Supp. 211, 218 (D.Me.1996); accord James v. Southern California Edison Co., No. 94-1085-J (S.D.Cal. filed Dec. 13, 1994). That there is no monolithic PLA (as defendants vigorously argue) is clear from the Third Circuit's reasoning in TMI II:

> In explicitly providing that the "substantive rules for decision" in [PLAs] "shall be derived from" the law of the state in which the nuclear incident occurred, we believe that Congress expressed its intention that state law provides the content of and operates as federal law....
> ...
> ... [I]n every case alleging public liability, courts will be required to determine whether state law principles conflict with other parts of the Price- Anderson scheme.

TMI II, 940 F.2d at 855, 858 (emphasis supplied). The Court, therefore, will address each of plaintiffs' claims.

2. Plaintiffs' Claims

a. Negligence-Based Claims

[18][19] The first cause of action against defendant NYPA is a wrongful death action alleging negligence on the part of the NYPA "in owning, operating, controlling, supervising, surveying, monitoring, maintaining and managing the possession and use of nuclear material at the" IP3 Nuclear Power Plant. As in any negligence action, the plaintiff must allege that the defendant violated its duty of care. This Court adopts the reasoning of the Third and Seventh Circuits' decisions in TMI II, 940 F.2d at 858-59, [FN6] TMI III, 67 F.3d at 1113-15, [FN7] and O'Conner, 13 F.3d at 1105, which generally stand for the proposition that the

appropriate standard of care must be dictated by federal law, including those federal safety regulations governing exposure to radiation. As the O'Conner Court reasoned, imposing any other standard of care would contravene the federal interest in occupying the field of nuclear safety, see O'Conner, 13 F.3d at 1105 ("the field of nuclear safety has been occupied by federal regulation"), and "disturb the carefully crafted balance between private involvement and safety that Congress has achieved." Id.

FN6. "[T]he duty the defendants owe the plaintiffs in tort is dictated by federal law." TMI II, 940 F.2d at 858 (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)). See also TMI III, 67 F.3d at 1106 (in "[e]xamining the [1988] Amendments Act's 'federal components,' we found federal preemption of state tort law on the applicable standard of care").

FN7. Although TMI III specifically held that federal regulations governing exposure to radiation in "unrestricted" areas--namely, 10 C.F.R. §§ 20.105 and 20.106--provided the standard of care, I find the reasoning underlying that opinion to apply with greater force with respect to exposure standards in "restricted" areas. A "restricted area" is defined in relevant part as "any area access to which is controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials." 10 C.F.R. § 20.3(a)(14). The federal interest in regulating the exposure levels for individuals working in restricted areas appears greater than in unrestricted or "offsite" areas. At any rate, extending TMI III 's reasoning to restricted areas is consistent with that Court's holding, and I find

none of the reasons for distinguishing TMI III proffered by plaintiffs persuasive.

[20] In addition, I also adopt that part of the reasoning in TMI III which rejected the ALARA standard as the appropriate duty of care:

> if jurors make the ALARA determination, then this "results, essentially, in a negligence standard." Adopting ALARA as part of the standard of care would put juries in charge of deciding the permissible levels of radiation exposure and, more generally, the adequacy of safety procedures at nuclear plants--issues that have explicitly been reserved to the federal government in general and the [Nuclear Regulatory Commission] specifically.
>
> Adoption of a standard as vague as ALARA would give no real guidance to operators and would allow juries to fix the standard case by case and plant by plant.... Our holding protects the public and provides owners and operators of nuclear power plants with a definitive standard *387 by which their conduct will be measured.

TMI III, 67 F.3d at 1117 (quoting lower court) (citations omitted).

[21][22] Although the Second Amended Complaint for the most part makes vague allegations that the deceased was exposed to "dangerous," "excessive," or "life threatening" levels of radiation, it also alleges that the deceased plaintiff was "exposed to levels of radiation in excess of the regulations" and cites the applicable regulations governing occupational dose limits. Because I must read the complaint liberally, in light of the fact that the plaintiffs are proceeding pro se, I find that plaintiffs have alleged sufficient facts to support a claim that Mr. Corcoran was exposed to radiation in excess of the occupation dose limits set by the applicable federal regulations. Accordingly, the negligence claim will not be dismissed. [FN8]

FN8. Because they are dependent on a breach of the standard of care, the Court will not dismiss plaintiffs' second and third causes of action, alleging negligence based on defendants' alleged "failure to warn" the deceased of the dangerous condition of the site where he worked, and accusing defendants of "negligent misrepresentation," respectively. Such claims will be construed as also alleging that the defendants breached their obligation to maintain exposure levels within the acceptable dose limits set by federal regulations.

b. Intentional Torts [FN9]

FN9. This claim encompasses the fourth cause of action of the Second Amended Complaint (against NYPA and WEDCO) as well as the first cause of action of the Amended Complaint against Westinghouse.

[23] Consistent with the above, the Court is not persuaded that public liability claims based on intentional torts are per se preempted under the Act. At issue is whether the intentional tort alleged is inconsistent with Section 2210. See 42 U.S.C. § 2014(hh).

[24] Plaintiffs allege a barrage of intentionally tortious conduct against the NYPA and Westinghouse. According to plaintiffs, the NYPA and Westinghouse: (1) "failed to monitor the plaintiff ... to accurately determine his exposure to radiation"; (2) "knowingly permitted to exist and failed to correct business and industrial practices which subjected [the deceased] to dangerous levels of radiation"; (3) "failed to adequately and timely, [sic] make or cause to be made surveys to determine the extent of radiation hazards present in and around the area" where the deceased was assigned to work prior to sending him there; (4) following discovery of the allegedly dangerous condition, "deliberately failed to

immediately barricade the area and post radiation caution signs to warn and to prevent unsuspecting individuals, including [the deceased], from entering" and "intentionally assigned [the deceased] to work in and around the dangerously radioactive area without the benefit of equipment that would warn and/or protect him from the dangers present"; (5) knew that the deceased was unaware "that he had been exposed to levels of radiation in excess of the regulations" and that the deceased "believed defendants would advise him if there was a possibility that he had been exposed to excessive levels of radiation"; and (6) "knew with substantial certainty" of the gravity of the deceased plaintiff's exposure and the danger to his health arising therefrom, yet "deliberately concealed and intentionally failed to notify [the deceased] of his excessive exposure to radiation, and ... to provide him with medical monitoring, treatment or care."

[25] Many of these allegations sound in negligence, and are not properly pleaded as predicate facts constituting an intentional tort. Plaintiffs, however, plead sufficient facts that may state a claim for battery under New York law. In New York, "battery is 'an intentional wrongful physical contact with another person without consent.' " Rivera v. Puerto Rican Home Attendants Servs., Inc., 930 F.Supp. 124, 132-33 (S.D.N.Y.1996) (Not Rep. in F.Supp.) (quoting United Nat'l Ins. Co. v. Waterfront New York Realty Corp., 994 F.2d 105, 108 (2d Cir.1993)). If, as plaintiffs allege, the defendants knew of the dangerous condition and nonetheless intentionally assigned the deceased to work there with the intent that he become exposed to the radiation without his consent, then plaintiffs may have stated a *388 claim for battery. See Rivera, 930 F.Supp. at 131-32 (for battery, "the required intent is merely that the defendant intentionally made bodily contact and that the intended contact was itself offensive or without consent"). In order to make the claim consistent with the federal interest in regulating nuclear safety, however, this Court finds that plaintiffs' intentional tort claim must additionally plead a violation of the

regulations governing occupational dose limits. Since plaintiffs have alleged that Mr. Corcoran was exposed "to levels of radiation in excess of the regulations," this PLA claim states a valid cause of action.

c. Claims Alleging "Statutory Liability"

[26] As a fifth cause of action against NYPA and a second cause of action against Westinghouse, the plaintiffs allege these defendants violated various statutes and regulations that

> include, but are not limited to, 18 U.S.C. 371 and 10 C.F.R. sections 20.1, 20.101, 20.103, 20.201, 20.202, 20.203, 20.401, 20.403, 20.405, 20.408, 20.409, [FN10] and section 223 of the Atomic Energy Act of 1954, as amended and set forth in the regulations under 10 C.F.R. section 20.602.

> FN10. This Court, as the Third Circuit in TMI III, will consider only those regulations applicable at the time of the alleged nuclear incident. See TMI III, 67 F.3d at 1108 n. 10. In 1985, Section 20.1 stated, in relevant part, that the purpose of the regulations is
> to control the possession, use, and transfer of licensed material by any licensee in such a manner that the total dose to an individual ... does not exceed the standards of radiation protection prescribed in the regulations....
> ... [P]ersons engaged in activities under licenses issued by the [NRC] ... should, in addition to complying with the requirements set forth in this part, make every reasonable effort to maintain radiation exposures ... as low as is reasonably achievable. The term "as low as is reasonably achievable" means as low as is reasonably achievable

> taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest.
> 10 C.F.R. § 20.1(b) and (c) (1985). Sections 20.101 and 20.103 set forth the standards for radiation exposure by individuals in "restricted areas." Section 20.201 obligates licensees to conduct surveys to ensure compliance with the regulations. Section 20.202 obligates licensees to provide certain personnel with monitoring equipment under certain express conditions. Section 20.203 regulates the manner of posting signs and controlling access to radiation areas, as well as labelling containers. Section 20.401 pertains to the licensee's obligation to maintain records of surveys and radiation monitoring. Sections 20.403 and 20.405 obligate licensees to notify and provide reports to the NRC of incidents involving radiation exposure. Section 20.408 requires the filing of reports of former employees' individual exposure incurred during the period of employment. Section 20.409 requires licensees to notify individuals who are exposed to radiation and for whom reports must be filed with the NRC under Sections 20.405 or 20.408.

Plaintiffs claim the defendants "willfully violat[ed] the[se] statutes and regulations," which "proximately caused or contributed to" the deceased's "sustaining a radiation exposure which initiated or promoted his leukemia and ultimately caused his death." In their Memorandum of Law in opposition to the motion to dismiss, the plaintiffs elucidate their theory of liability under this cause of action. They do not assert a private right of action under these statutes; [FN11] rather, they look to these statutes and regulations as elements of a PLA.

FN11. Indeed, plaintiffs admit that the Atomic Energy Act "does not create a private right of action for parties who wish to themselves regulate or enforce NRC regulations."

No PLA can be based on these statutes or regulations, however, because the rules of decision for a PLA must be derived from state, not federal, law. See 42 U.S.C. § 2014(hh). Furthermore, although the plaintiffs argue more specifically that 18 U.S.C. § 371 [FN12] and 10 C.F.R. § 20.602 [FN13] impose *389 a duty of care which defendants allegedly violated, I find that this "state" law claim directly violates both the letter and spirit of Section 2014(hh)'s command, for the duty of care thus imposed would necessarily depend on a federal rule of decision. To argue, as plaintiffs do, that a duty of care can be derived from all federal statutes or regulations would simply render Section 2014(hh)'s language a nullity. Indeed, it would allow private individuals to assume the role of the United States' Attorney General as the exclusive enforcer, by judicial action, of the Atomic Energy Act:

FN12. Section 371 provides, in relevant part:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
18 U.S.C.A. § 371 (West Supp.1996).

FN13. 10 C.F.R. § 20.602 was enacted in November 1992 and expressly states which regulations apply (and do not apply) to 42 U.S.C. § 2273, which is the general provision outlining the penalties for violations of the Atomic Energy Act and its regulations.

No action shall be brought against any individual or person for any violation under this chapter unless and until the Attorney General of the United States has advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General of the United States....

42 U.S.C. § 2271 (emphasis supplied); see also County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 59 (2d Cir.1984) (citing 42 U.S.C. § 2271 and affirming dismissal of complaint against power company "insofar as it seeks to enforce NRC-promulgated regulations"). Therefore, these causes of action must be dismissed.

d. Conspiracy to Defraud Claim

Plaintiffs allege that NYPA and Westinghouse [FN14] "had knowledge that the [IP3] turbine stop valve upon which [the deceased] was assigned to work in June of 1985 had become dangerously contaminated with radiation," and that they "conspired together and maliciously and willfully entered into a scheme to conceal" this fact from the deceased, who "had been seriously exposed to excessive radiation," for the purpose of "defrauding and deceiving the Nuclear Regulatory Commission, the plaintiff, and others, so as to justify the viability of nuclear energy in general, and the existence of [IP3], in particular."

> FN14. This cause of action encompasses the sixth claim of the Second Amended Complaint and the third claim of the Amended Complaint against Westinghouse.

[27][28][29] Plaintiffs do not have standing to assert the NRC's (or anyone else's) rights against the defendants, assuming that such a conspiracy to defraud the NRC (or others) is in fact true. With respect to the alleged fraud perpetrated against the deceased, himself, the issue is

whether such a state law claim is inconsistent with Section 2210. In New York, to state a cause of action for fraud based on fraudulent concealment the plaintiff must allege: (1) a material false representation or omission, (2) with the intent to defraud, (3) reasonable reliance, (4) damages, and (5) a duty to disclose. See Palmer v. A & L Seamon, Inc., 1996 WL 153946, at *2 (S.D.N.Y. Apr. 2, 1996) (citing Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 1483 (2d Cir.1995); Banque Arabe et Internationale v. Maryland Nat'l Bank, 57 F.3d 146, 153 (2d Cir.1995)). I do not find that a fraudulent concealment claim is inconsistent with the provisions of Section 2210. Cf. Bohrmann, 926 F.Supp. at 219-20 ("The federal safety regulations do not immunize a defendant from liability for making fraudulent representations to persons either before or after subjecting them to radiation."). Unlike Bohrmann, however, I hold that no fraud can be perpetrated against the plaintiffs unless they demonstrate that the defendants violated the applicable regulations governing occupational dose limits. It would be inconsistent with the Act to allow the plaintiffs to state a claim of any kind that is premised on an exposure to radiation which a federal agency, in its expertise, has concluded is not unsafe. Because plaintiffs have in the amended complaints pled that Mr. Corcoran was exposed to levels of radiation in excess of the regulations, I reject defendants' contention that such fraud claim is preempted by the Act. [FN15]

> FN15. The Court, of course, has not ruled on the motion for summary judgment on the notice of claim issue, which will be fully submitted to this Court in several months. It may be, as defendants argue, that because the plaintiffs failed to timely file a notice of claim against NYPA, the Estate cannot recover against the NYPA under any cause of action for its damages arising from the wrongful death of the deceased.

*390 e. Survival Claim

[30] Carrie also brings a survival action [FN16] on behalf of her father seeking to recover damages for the injuries he suffered prior to his death. [FN17] Since "[a] survival action, after all, is essentially a decedent's personal injury lawsuit," In re Brooklyn Navy Yard Asbestos Litigation, 971 F.2d 831, 851 (2d Cir.1992), this cause of action is dependent on the viability of the aforementioned causes of action.

FN16. See N.Y. Est. Powers & Trusts Law § 11-3.2(b) (McKinney Supp.1996) ("No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed.")

FN17. This cause of action is the seventh claim of the Second Amended Complaint and the fourth claim of the Amended Complaint.

3. Liability of Westinghouse as Contractor

[31] Westinghouse argues that because the Act "channels" all public liability to the licensee (NYPA in this instance), "[e]ven if Plaintiffs were to reassert their claims against Westinghouse in a properly drafted PLA, the claims against Westinghouse should be dismissed because Westinghouse would not be a proper party." [FN18] Westinghouse cites a single, two-page Memorandum Opinion in support of this proposition. See Grimes v. Baltimore Gas & Elec. Co., No. 95-1042, 1995 WL 901885 (D.Md. Nov. 8, 1995) (dismissing claims against non-licensee defendants) (citing O'Conner v. Commonwealth Edison Co., 807 F.Supp. 1376, 1378 (C.D.Ill.1992), aff'd, 13 F.3d 1090, (7th Cir.) cert. denied, 512 U.S. 1222, 114 S.Ct. 2711, 129 L.Ed.2d 838 (1994) (citations omitted)).

FN18. It should be noted that Westinghouse in its reply motion shifted grounds with respect to its liability under the Act. In the motion to dismiss, Westinghouse merely argued that all claims against it also should fall under the rubric of a PLA and preempt any state law claims.

[32] An important feature of the Act, it is true, is its "channeling of liability" provision, under which "any entity exposed to potential liability for activity resulting in a nuclear incident, even if it were not a direct participant in the activity, was entitled to indemnification." TMI II, 940 F.2d at 852 (citing S.Rep. No. 218, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 1476, 1477). [FN19] The O'Conner District Court explained:

FN19. 42 U.S.C. § 2014(t) defines "person indemnified", with respect to a nuclear incident occurring within the United States, as "the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability." (Emphasis supplied.)

In passing the Price-Anderson Act, Congress recognized that a nuclear incident might be caused by any number of participants in the nuclear industry beyond the actual licensee. Congress did not want quick and fair compensation to be hampered by the complications likely to ensue if multiple defendants, each with its own law firm, were actively and separately defending. In a "significant departure from normal tort law precepts," Congress, through mandatory indemnification provisions, channelled all public liability to licensees, and away from non-licensees, (such as contractors ...), who might otherwise have borne such liability under ordinary tort law.... The channelling provisions alter the ordinary congruence in tort law between causing and bearing

liability. Consequently, contractor London Nuclear Services cannot separately be liable to plaintiff in any manner in this case.

O'Conner, 807 F.Supp. at 1378 (citations omitted) (emphasis supplied). This Court finds Westinghouse's argument unpersuasive for two reasons. First, as the above quote makes clear, the contractor (London Nuclear Services) was not dismissed from the case; in fact, the contractor had remained a party throughout the litigation. See O'Conner, 13 F.3d 1090; O'Conner v. Commonwealth Edison Co., 748 F.Supp. 672 (C.D.Ill.1990). Therefore, the District Court's decision in Grimes is also unpersuasive. Second, it is incongruous to argue that contractors cannot be subject to suit simply because they may be indemnified. After all, with respect to ENOs, a waiver of defenses may be required by the NRC, and yet the contractor remains a properly named defendant in such an action. ***391** See 42 U.S.C. § 2210(n)(1). [FN20] Therefore, this action will not be dismissed against Westinghouse.

FN20. That Section reads, in relevant part:
With respect to any [ENO] to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which [arises out of certain enumerated events] ... the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have

> known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action....
> 42 U.S.C. § 2210(n)(1) (emphasis supplied).

B. WEDCO

[33][34] WEDCO moves to be dismissed from the case pursuant to Rules 12(b)(4) and (5), Fed.R.Civ.P., for plaintiffs' failure to effect proper service; pursuant to Rule 12(b)(6), Fed.R.Civ.P., because although WEDCO remains nominally in the case as a party named in the caption, no claims are asserted against WEDCO in the Second Amended Complaint; and because WEDCO is a dissolved corporation without capacity to be sued.

[35] Since plaintiffs have alleged no claims against WEDCO in the Second Amended Complaint, there is no theory of liability with respect to WEDCO and, therefore, no claim upon which relief can be granted. Furthermore, WEDCO lacks capacity to be sued. "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Rule 17(b), Fed.R.Civ.P. It is uncontested that WEDCO was a Delaware corporation and was dissolved on May 2, 1978. In Delaware,

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of ... defending suits ... against them....

Del.Code Ann. tit. 8, § 278 (1991). Plaintiffs commenced their action in state court in March 1995, more than

seventeen years after WEDCO's dissolution. Furthermore, the Delaware Chancery Court's power to extend the three-year window must be exercised within such three-year window. See In re Citadel Indus., Inc., 423 A.2d 500, 503 (Del.Ch.1980); see also United States v. McDonald & Eide, Inc., 670 F.Supp. 1226, 1230 (D.Del.1987) (citing Citadel), aff'd, 865 F.2d 73 (3d Cir.1989). Thus, once the corporation has dissolved and the three-year window has closed, it cannot be reopened under Section 278; only Section 279, Del.Code Ann. tit. 8, § 279, is applicable. See Citadel, 423 A.2d at 504; McDonald & Eide, 670 F.Supp. at 1230 ("Section 279 was intended to apply in situations where the three- year period has already expired...."). Section 279 states in relevant part:

> When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, at any time, may appoint 1 or more of the directors of the corporation to be trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid ... and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

*392 Del.Code Ann. tit. 8, § 279 (1991) (emphasis supplied). The language of Section 279 implies that its primary purpose is to safeguard the collection and administration of still existing property interests of a dissolved corporation....

Where there are no undistributed assets against which to effect a recovery, § 279 provides little solace to one possessing an after- discovered claim against a dissolved corporation. Citadel, 423 A.2d at 506.

Because it is undisputed that no judicial extension of the three-year period under Section 278 has been effected, and all of WEDCO's assets were distributed as of 1978, WEDCO cannot be continued as a corporation subject to suit pursuant to Section 279. Accordingly, WEDCO must be dismissed as a defendant. See Gonzalez v. Progressive Tool & Die Co., 455 F.Supp. 363, 365 (E.D.N.Y.1978) (applying Massachusetts law); Sevits v. McKiernan-Terry Corp., 264 F.Supp. 810, 811-12 (S.D.N.Y.1966) (applying Delaware law).

C. Plaintiffs' Motion To Substitute Westinghouse for WEDCO

[36][37] Plaintiffs in their memorandum of law opposing the motion to dismiss, "request leave of Court to further amend the complaint in [the NYPA action], by interlineation of the caption, substituting" Westinghouse for WEDCO. [FN21] Plaintiffs rely on Rule 15(c), Fed.R.Civ.P., which provides, in relevant part:

> FN21. Defendants understandably complain that plaintiffs' application is procedurally defective, since it appears in their memorandum of law and is not brought by motion, pursuant to Rule 7(b), Fed.R.Civ.P. ("An application to the court for an order shall be by motion"), and Local Civil Rule 3. Defendants, however, have had notice of this request since September 27, 1995, when plaintiffs filed a "reply" in opposition to defendants' first Rule 12 motion. Defendants also filed a memorandum of law on March 6, 1996, in opposition to plaintiffs'

application. Since the issue has been fully briefed by all parties, the Court, in its discretion, will decide plaintiffs' application on the merits.

An Amendment of a pleading relates back to the date of the original pleading when
(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Rule 15(c), Fed.R.Civ.P. Rule 15(c) thus requires that each of the following requirements be met: (1) the claim must have arisen out of conduct set out in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party should have known that, but for a mistake of identity, the original action would have been brought against it; and (4) the second and third criteria are fulfilled within 120 days of the filing of the original complaint, and the original complaint was filed within the limitations period. See Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 468-69 (2d Cir.1995).

The claims against Westinghouse that plaintiffs argue should relate back to the filing of the original complaint are (1) various "intentional torts," which the Court above concluded may state a claim for battery; (2) "statutory liability"; and (3) "conspiracy to defraud." The statutory liability claim is dismissed, and, therefore, cannot relate back. Looking at the conduct set forth in the original complaint, the various claims asserted against WEDCO were related to WEDCO's alleged role in the design and construction of the equipment that plaintiffs' contend caused *393 the deceased's exposure to radiation. Thus, "the tortious conduct complained of" in the original complaint--negligent or defective design or construction of equipment at IP3--occurred before WEDCO's dissolution in May 1978, and, a fortiori, before any of the conduct presently alleged in the Amended Westinghouse Complaint as constituting intentional torts or conspiracy to defraud on the part of Westinghouse. [FN22] Relation back is, therefore, inappropriate because " ' "the general fact situation alleged in the original pleading" ' " cannot be said to have given " 'adequate notice of the matters raised in the amended pleading.' " Kitrosser v. CIT Group/Factoring, Inc., 1995 WL 567115, *3 (S.D.N.Y. Sept. 25, 1995) (Cote, J.) (quoting In re Chaus Secs. Litig., 801 F.Supp. 1257, 1264 (S.D.N.Y.1992) (quoting Contemporary Mission, Inc. v. New York Times Co., 665 F.Supp. 248, 255 (S.D.N.Y.1987), aff'd, 842 F.2d 612 (2d Cir.), cert. denied sub nom. O'Reilly v. New York Times Co., 488 U.S. 856, 109 S.Ct. 145, 102 L.Ed.2d 117 (1988))).

> FN22. Thus plaintiffs wrote: "On information and belief, WEDCO ... dissolved on or about May 18, 1979, after the tortious conduct complained of herein." (Emphasis supplied.)

Moreover, it is clear that plaintiffs were not mistaken about Westinghouse's identity. See Barrow, 66 F.3d at 469 (Rule 15(c)'s requirement that defendant knew it was not named due to a mistake concerning identity " 'presupposes that in fact the reason for [its] not being named was a mistake in

identity' ") (quoting Cornwell v. Robinson, 23 F.3d 694, 705 (2d Cir.1994)). Plaintiffs were well aware of Westinghouse's status as the deceased's employer at the time the original complaint was filed. [FN23] Plaintiffs also knew that WEDCO was the entity "involved in the general design of the systems and equipment in [IP3]." That plaintiffs chose to state claims of negligent or defective design and strict liability against WEDCO makes clear, beyond peradventure, that this is not a case of mistaken identity. [FN24]

> FN23. Thus, the original complaint states that Mr. Corcoran "performed this work under a contract or other agreement for services between NYPA and his employer, Westinghouse...."
>
> FN24. Rule 15(c)(1), Fed.R.Civ.P., is of no assistance to plaintiffs, assuming that in a PLA the forum state's statute of limitations applies, because the "New York and Federal Rules regarding relation back are similar, and courts in the Second Circuit have not distinguished the two." Morse/Diesel Inc. v. Fidelity and Deposit Co. of Maryland, 1995 WL 358627, at *10 n. 5 (S.D.N.Y. June 15, 1995) (Cote, J.) (citing, inter alia, The Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 125 (2d Cir.1994)).

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is denied in all respects, except that the fifth cause of action of the Second Amended Complaint and the second cause of action of the Amended Westinghouse Complaint, and all claims against WEDCO are hereby dismissed with prejudice. The plaintiffs' motion to substitute Westinghouse for WEDCO in the NYPA action is denied.

SO ORDERED:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARRIE CORCORAN, as executrix of the estate of Eugene Corcoran, deceased, and CARRIE CORCORAN, Individually,

Plaintiffs,

v.

NEW YORK POWER AUTHORITY and WEDCO CORP.,

Defendants.

95 Civ. 5357(DLC)

CARRIE CORCORAN, as executrix of the estate of Eugene Corcoran, deceased, and CARRIE CORCORAN, Individually,

Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant.

95 Civ. 8102(DLC).

OPINION

September 26, 1997

APPEARANCES:
For Plaintiffs:
Carrie Corcoran, Pro Se
8297 South Ridge Drive
Macungie, PA 18062

For Defendants
Wendy Fleishman, Esq.
SKADDEN ARPS SLATE MEAGHER & FLOM, LLP
919 Third Avenue
New York, NY 10022-3897

DENISE COTE, District Judge:

Carrie Corcoran, on her own behalf and as Executrix of Eugene Corcoran's estate [FN1] ("plaintiffs") filed this action against the New York Power Authority ("NYPA") and WEDCO Corporation ("WEDCO") in state court on March 15, 1995 (the "NYPA action"), alleging that Ms. Corcoran's father had died as a result of exposure to radioactive contamination while working as a millwright at the Indian Point 3 nuclear power plant ("IP3"). The defendants timely removed the action to federal court on July 18, 1995. On September 21, 1995, plaintiffs filed an amended complaint in the NYPA action and filed a new action (the "Westinghouse action") against Westinghouse Electric Corporation ("Westinghouse"), Mr. Corcoran's employer. On December 27, 1995, plaintiffs filed an amended complaint in the Westinghouse action. On January 17, 1996, plaintiffs filed a Second Amended Complaint in the NYPA action. On July 29, 1996, this Court granted in part and denied in part the defendants' motion to dismiss plaintiffs' claims. Corcoran v. New York Power Auth., 935 F.Supp. 376 ("Corcoran I "). [FN2]

> FN1. The Second Circuit recently held that an executor or administrator of an estate may not proceed pro se on behalf of that estate if they are not the sole beneficiary. See Prigden v. Andresen, 113 F.3d 391, 393 (2d Cir.1997). The evidence before the Court indicates that, although Ms. Corcoran would apparently be the sole beneficiary of any award in these actions, she was not the sole beneficiary of her father's estate. Given the fact that Ms. Corcoran is also proceeding individually and given the result reached here, the Court does not further address this issue.

FN2. In Corcoran I, this Court denied the defendants' motion to dismiss as to all of plaintiffs' claims except the fifth cause of action against NYPA and the second cause of action against Westinghouse. Additionally, the Court dismissed all of plaintiffs' claims against WEDCO.

This motion for summary judgment by the defendants and the cross motion for summary judgment by the plaintiffs followed. [FN3] For the reasons stated below the defendants' motion for summary judgment is granted and plaintiffs' cross motion is denied.

FN3. Following the submission of the motion papers, there were several letters sent to the Court from the plaintiffs and defendants. The Court has fully considered all arguments presented in these papers.

Background

Corcoran I fully lays out the procedural and factual history of this action and familiarity with that opinion is presumed. The undisputed facts necessary to address the instant motions are as follows.

Between June and August 1985, Eugene Corcoran was employed by Westinghouse to do maintenance work at IP3 on the steam supply system, generator and turbine on the non-nuclear side of IP3. Within the IP3 turbine building there are four stop valves located at each corner of the high pressure turbine. On June 25, 1985, loose radioactive contamination [FN4] was found on the stop valve ("SV") located at the southwest corner of the turbine building, referred to as SW SV. There is a dispute as to whether Mr. Corcoran worked on SW SV in June 1985 and whether loose radioactive contamination was discovered on other SV's. While there is no dispute that millwrights, such as Mr. Corcoran, working in the area were not provided with

protective clothing or personal radiation monitoring devices, defendants maintain that such clothing and devices were not necessary to protect the workers from the contamination found on June 25, 1985.

> FN4. Loose radioactive contamination is contamination that may be removed from the surface of the object. In contrast, fixed contamination is embedded in material.

Seven years later, on March 16, 1992, Mr. Corcoran was diagnosed with chronic myeloid leukemia ("CML") by Dr. Balagot. Dr. Shevde confirmed this diagnosis on March 20, 1992. While neither of these doctors recall discussing with Mr. Corcoran the specific cause of his CML, both testified that it is their practice to discuss with patients the possible link between radiation exposure and CML. Both noted that they questioned Mr. Corcoran about his past work experience.

In the spring or summer of 1992, Mr. Corcoran called Stephen Coli, a millwright with whom Mr. Corcoran had worked at IP3 in 1985 and who was again working at IP3. Mr. Corcoran told Mr. Coli that he had been diagnosed with CML and asked Mr. Coli to make inquiries regarding their possible exposure to radiation at IP3 in the summer of 1985. The substance of Mr. Coli's subsequent conversations with Mr. Corcoran is disputed.

Also, in the Spring of 1992, his ex-wife, Carol Ellis, suggested that Mr. Corcoran see a lawyer about the possibility of his pursuing a radiation claim relating to his work at IP3. Mr. Corcoran died on September 25, 1993, at the age of fifty from complications due to CML. During his lifetime, Mr. Corcoran did not file a notice of claim with NYPA regarding his possible radiation exposure. He did, however, file an asbestos lawsuit on December 24, 1992, having been diagnosed with asbestosis on October 24, 1992.

On April 5, 1994, Carrie Corcoran filed a notice of claim with NYPA, claiming damages for Eugene Corcoran's injuries and wrongful death.

Standard

Under Rule 56(c), summary judgment may only be granted if the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the initial burden to show the Court the basis for its motion and to identify the matters it "believes demonstrate[s] the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265. In determining whether summary judgment is appropriate, a "court 'must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.' " American Casualty Co. of Reading, PA. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir.1994) (quoting Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 572 (2d Cir.1993)). The substantive law determines what facts are material to the outcome of the litigation. See Anderson, 477 U.S. at 248.

Once the moving party meets his burden, the non-moving party has the burden of presenting "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.Proc. 56(e). The non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); see Christian Dior-New York, Inc. v. Koret, Inc., 792 F.2d 34, 38 (2d Cir.1986) (the non-moving party must provide the court with some basis to believe his "version of relevant events is not fanciful").

When a party is proceeding pro se, as in the instant action, this Court has an obligation to "read his supporting papers

liberally, and ... interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994); Soto v. Walker, 44 F.3d 169, 173 (2d Cir.1995). A pro se party's "bald assertion," however, completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment. Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir.1991).

Discussion

As discussed in Corcoran I and conceded by the parties there, a "public liability action" ("PLA") under the Price Anderson Act is plaintiffs' exclusive right of action. Corcoran I, 935 F.Supp. at 383. The substantive rules for decision of a PLA are derived from the law of the state in which the nuclear incident occurred. Id. at 385. See also 42 U.S.C. § 2014(hh); In re TMI Litigation II, 940 F.2d 832, 855 (3d Cir.1991), cert. denied, 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992). Whether the statute of limitations for a PLA is derived from federal or state law would ordinarily depend on whether the statute of limitations is considered "substantive" or "procedural." A court, however, "should take care to avoid [the] talismanic application" of these categories. Vernon v. Cassadaga Valley Cent. School Dist., 49 F.3d 886, 892 (2d Cir.1995) (Cabranes, J., concurring).

> Because statutes of limitations create important reliance interests, govern whether or not an individual can vindicate a right, and prevent a court from deciding stale claims, they lie on the cusp of the procedural/substantive distinction.

Id. The critical issue is whether the tolling limitation at issue is consonant with the legislative scheme. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 557-58, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Regardless of how the Court resolves the issue in the instant action, the result is the same.

Deciding that the statutes of limitations are substantive would require the Court to apply state statute of limitations to a PLA. See Lujan v. University of California, 69 F.3d 1511, 1516 (10th Cir.1995); Corcoran I, 935 F.Supp. at 385. If the Court were to decide that the statute of limitations is procedural this would imply the application of federal law. The Price-Anderson Act, however, does not contain a statute of limitations provision. [FN5] When Congress does not provide a statute of limitations for claims arising under a federal statute, the Court applies the limitations period of the most closely analogous state-law cause of action. See North Star Steel Co. v. Thomas, 515 U.S. 29, 33-34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995); Sandberg v. KPMG Peat Marwick, L.L.P., 111 F.3d 331, 333 (2d Cir . 1997). There is a narrow exception to this rule which allows application of an analogous federal statute of limitations where the state provision would "frustrate or interfere with the implementation of national policies," or would "be at odds with the purpose or operation of federal substantive law." North Star Steel Co., 515 U.S. at 34 (internal citations omitted). This exception does not apply here where Congress has provided that the substantive cause of action is derived from state law. Thus, even if the statute of limitations were considered a procedural rule of law, the Court would be referred to New York law in this case.

> FN5. The Act does include a section which allows the Nuclear Regulatory Commission or the Secretary of Energy to require the licensees and contractors to waive defenses based on the statute of limitations in cases of an "extraordinary nuclear occurrence" ("ENO")--this term is defined in the Act and is not applicable here. 42 U.S.C. § 2210(n)(1). This provision has been interpreted as creating a statute of limitation for actions arising out of an ENO. See Lujan, 69 F.3d at 1515.

In any event, the notice of claim provision on which

defendants' rely here does not merely bar the remedy for a violation, but is actually a condition on the right itself. See Piesco v. City of N.Y., Dept. of Personnel, 650 F.Supp. 896, 900 (S.D.N.Y.1987) (construing notice of claim provisions), rev'd on other grounds, 933 F.2d 1149 (1991); Davidson v. Bronx Muni. Hospital, 64 N.Y.2d 59, 484 N.Y.S.2d 533, 534, 473 N.E.2d 761 (N.Y.1984) (Per Curiam). Similarly, the statute of limitations for wrongful death and survival claims also limit the right to institute those actions. See Lujan, 69 F.3d at 1517. Thus, it is particularly appropriate that the Court apply the notice of claim provision to these actions as it would any other substantive rule for decision. [FN6]

FN6. After briefing on the instant motions was complete, in a letter dated April 24, 1997, plaintiffs urge the Court to consider the importance of selecting a single, neutral statute of limitations for all federal claims arising under the same federal law and request the opportunity for further briefing on the subject. Plaintiffs cite cases applying that principle to actions arising under 42 U.S.C. § 1983. Because the Price Anderson Act specifically states that substantive rules for decision are to be governed by state law, the Section 1983 analogy is unpersuasive. Thus, additional briefing is unnecessary.

Plaintiffs' Claims Against NYPA

The complaints in these actions contain both wrongful death and survival claims. According to New York law, a plaintiff in a wrongful death action may recover against a "person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued." N.Y.Est. Powers & Trusts Law § 5-4.1(1) (McKinney 1997). The General Municipal Law allows for the filing of a notice of claim in a wrongful death action within ninety days of the

appointment of a representative of the decedent's estate. N.Y.Gen.Mun.Law § 50-e(1)(a) (McKinney 1986). That the decedent's action was not barred by the applicable statute of limitations at the time of his death, however, is a condition precedent to maintaining an action for wrongful death. See Sweeney v. Columbia Presbyterian Medical Center, 738 F.Supp. 802, 804 n. 3 (S.D.N.Y.1990); Kelliher v. New York Cent. & H.R.R. Co., 212 N.Y. 207, 212, 105 N.E. 824 (N.Y.1914); Phelps v. Greco, 177 A.D.2d 559, 576 N.Y.S.2d 158, 159 (2d Dep't 1991). Similarly, a survival claim, which is essentially a continuation of the decedent's personal injury action, is dependent on the viability of the claims at the time of the person's death. N.Y.Est. Powers & Trusts Law § 11-3.2(b) (McKinney 1967). See Sweeney v. Presbyterian/Columbia Presbyterian M.C., 763 F.Supp. 50, 53 (S.D.N.Y.1991); Estate of Masselli v. Silverman, 606 F.Supp. 341, 343 (S.D.N.Y.1985). To preserve any claims against NYPA, which is a public authority, a claimant is required to file a notice of claim within 90 days of the date that the claim arose. N.Y .Gen.Mun.Law § 50-e (McKinney 1986). [FN7] See Piesco, 650 F.Supp. at 900 (construing Section 50-i); Davidson, 484 N.Y.S.2d at 534, 473 N.E.2d 761. Therefore, to decide whether the claims in this lawsuit survive Mr. Corcoran's death, the Court must determine the date on which each claim arose.

> FN7. Section 50-e is made applicable to NYPA through N.Y.Pub.Auth.Law § 1017(1) (McKinney 1994).

a. Negligence

The first three causes of action in the Second Amended Complaint in the NYPA action are based on a theory of negligence. Generally, claims for personal injury due to negligence accrue on the date of injury. N.Y.C.P.L.R. § 214 (McKinney 1990). When, as here, personal injury is alleged

to have been caused by the latent effects of exposure to a substance, Section 214-c of the New York Civil Procedure Law provides that the action

> shall be deemed to have accrued on the date of the discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier.

N.Y.C.P.L.R. § 214-c(3) (McKinney 1990) (emphasis supplied). The New York Court of Appeals recently held that the "discovery of the injury" standard in Section 214-c means "discovery of the condition on which the claim was based" and not discovery of the "etiology of that condition." Wetherill v. Eli Lilly & Co., 89 N.Y.2d 506, 655 N.Y.S.2d 862, 866, 678 N.E.2d 474 (N.Y.1997). See Golod v. Hoffman La Roche, 964 F.Supp. 841, 850 (S.D.N.Y.1997). [FN8] Accordingly, Eugene Corcoran's claim arose when he was diagnosed with CML on March 16, 1992 or at the latest on March 20, 1992, when that diagnosis was confirmed. Thus, the ninety day notice of claim period expired on June 18, 1992, without Eugene Corcoran or his representative filing such a notice.

> FN8. While Wetherill and Golod discuss the phrase "discovery of the injury" in the context of Section 214-c(2), which relates to the accrual of the three year statute of limitations, the legislature used the identical language in Section 214-c(3), which relates to the accrual date for the notice of claim.

Plaintiffs argue that a separate provision of Section 214-c should provide the statute of limitations, specifically Section 214-c(4). Section 214-c(4) extends the notice of claim period when

> technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration [of the limitations period].

N.Y.C.P.L.R. § 214-c(4) (McKinney 1990). The plaintiffs bear the burden of proving such a deficiency in scientific learning. Id. Section 214-c(4) does not apply to plaintiffs' claims. It is undisputed that as of the date of Mr. Corcoran's diagnosis science had discovered that workplace exposure to radiation could cause CML. Thus, Section 214-c(4) cannot extend the notice of claim period. See Annunziato v. City of New York, 164 Misc.2d 682, 624 N.Y.S.2d 544, 547 (N.Y.Sup.Ct.1995); Wetherill, 655 N.Y.S.2d at 865, 678 N.E.2d 474. The three causes of action for NYPA's negligence are thus time- barred.

b. Battery

Plaintiffs' fourth cause of action in the NYPA action is a claim for battery. In New York, "battery is 'an intentional wrongful physical contact with another person without consent.' " Rivera v. Puerto Rican Home Attendants Servs., Inc., 930 F.Supp. 124 (S.D.N.Y.1996). Battery is governed by the one-year statute of limitations for intentional torts. N.Y.C.P.L.R. § 215(3). An action for battery accrues when the nonconsensual offensive contact occurs. See Plaza v. Estate of Wisser, 211 A.D.2d 111, 626 N.Y.S.2d 446, 451 (1st Dep't 1995). The nonconsensual offensive contact of which the plaintiffs complain is Eugene Corcoran's alleged exposure to radiation in June 1935. As plaintiffs concede, the discovery of injury rule does not apply to intentional torts. See N.Y.C.P.L.R. § 214-c; Plaza, 626 N.Y.S.2d at 451. Thus, the cause of action sounding in battery must also be dismissed for failure to file a timely notice of claim.

c. Fraud

In Corcoran I, the Court found that the plaintiffs had pled sufficient facts to state a cause of action for fraudulent concealment and that such an action was not inconsistent with the Price-Anderson Act. Corcoran I, 935 F.Supp. at 389.

Defendants argue that plaintiffs are merely restating their battery claim as a fraud claim to circumvent the statute of limitations that bars their other claims.

If the fraud is only incidental to another asserted claim, the claim does not sound in fraud for purposes of measuring the statute of limitations period. See von Bulow v. von Bulow, 657 F.Supp. 1134, 1140 (S.D.N.Y.1987); Doe v. Roe, 192 A.D.2d 1089, 596 N.Y.S.2d 620, 620-21 (4th Dep't 1993). "The six- year fraud Statute of Limitations is only applicable when there would be no injury but for the fraud." N.Y. 7-Up Bottling Co. v. Dow Chemical Co., 96 A.D.2d 1051, 466 N.Y.S.2d 478, 480 (2d Dep't 1983). Thus, a court must "carefully review the underlying basis of any fraud claim to ensure that it truly is one for fraud." von Bulow, 657 F.Supp. at 1140.

Plaintiffs allege that NYPA fraudulently concealed the extent of radiation to which the millwrights were exposed and fraudulently maintained that the working conditions were safe. This fraud claim is incidental to plaintiffs' allegations of battery and negligence, which resulted in Mr. Corcoran's alleged exposure to radiation. As a consequence, the longer statute of limitations for fraud actions cannot be used to maintain an action that would otherwise be barred by the statute of limitations that apply to the primary theories of liability.

In any event, plaintiffs' fraud claim is barred because Mr. Corcoran failed to file a notice of claim within ninety days of the accrual of this claim. A claim for fraud accrues either when the fraud was committed or at the time the fraud was discovered or could have been discovered with reasonable diligence. See Bennett Silvershein Associates v. Furman, 91 Civ. 3118, 1997 WL 531310 at *7 (S.D.N.Y. Aug.28, 1997). Here, this means that plaintiffs' claim for fraud by NYPA accrued either in June 1985 or on March 20, 1992, when Mr. Corcoran discovered his illness and when with reasonable diligence he could have discovered the alleged fraud. Thus,

a notice of claim was not timely filed and this claim is barred.

d. Late Notice of Claim

Plaintiffs request that the Court accept plaintiffs' April 4, 1994 notice of claim as a late filed notice of claim. N.Y. Gen. Mun. Law § 50- e(5) (McKinney 1986). This Court, however, does not have jurisdiction to grant leave to file a late notice of claim. "All [such] applications ... shall be made to the supreme court or to the county court." N.Y.Gen.Mun.Law § 50- e(7) (McKinney 1986). See Katz v. City of New York, Dept. of Transportation, 94 Civ. 8319, 1996 WL 599668 at *12 (S.D.N.Y. Oct.17, 1996).

Even if the Court had jurisdiction, the plaintiffs have not shown that they would be entitled to file a late notice of claim. Section 50-e(5) states in relevant part:

> [T]he court shall consider, in particular, whether the public corporation ... acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was ... mentally or physically incapacitated ...; and whether the delay in serving notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

N.Y.Gen.Mun.Law § 50-e(5). The Court considers all relevant factors on an application to file a late notice of claim. See Diallo v. City of New York, 224 A.D.2d 339, 638 N.Y.S.2d 58, 59 (1st Dept.1996).

Here, NYPA had no actual or constructive notice of Eugene Corcoran's claims. Plaintiffs argue that NYPA had actual notice of the claims because it was aware of the 1985 contamination. Knowledge of the 1985 contamination, however, is insufficient to provide notice of Mr. Corcoran's

complaint. Eugene Corcoran was diagnosed with CML, the injury for which plaintiffs are seeking damages, seven years later. Additionally, plaintiffs have produced no evidence to show that Eugene Corcoran ever expressed any concern to NYPA that would have led it to anticipate that he might bring a claim.

Plaintiffs argue that Eugene Corcoran was physically and mentally incapacitated during the ninety days allowed to file the notice of claim. As evidence of that fact, they point to an August 7, 1995 affidavit of Dr. Shevde which states that "[d]uring the entire time he was under my care, the patient, Eugene Corcoran, was mentally and physically incapacitated..." To support a claim of mental and physical incapacity, medical testimony must explain with particularity the extent of the disability and demonstrate why that disability prevented the injured person from filing a timely notice of claim. See Frick v. Incorporated Village of Hempstead, 192 A.D.2d 605, 595 N.Y.S.2d 830, 831 (2d Dep't 1993). It is undisputed that Mr. Corcoran was seriously ill during the ninety day period. As the deposition testimony of Mr. Corcoran's treating physicians indicates, however, Mr. Corcoran made his own medical decisions during this time after consultations with his doctors in which he appeared to understand his options and to ask pertinent questions regarding his treatment. Moreover, Mr. Corcoran was able during this period to file a lawsuit claiming damages for exposure to asbestos. The conclusory statement by Dr. Shevde is simply insufficient to carry plaintiff's burden of proving incapacity.

Finally, NYPA was prejudiced by the delay in filing the claim. Mr. Corcoran, who would have been a crucial witness for both plaintiffs and defendants due to his knowledge of his own movements during the summer of 1985, has died. Thus, after weighing these factors, this Court would not, if it had the power to do so, approve the filing of a claim almost twenty-four months after the diagnosis of Mr. Corcoran's

CML and twenty-one months after the time to file the notice had run.

e. Equitable Estoppel

Plaintiffs claim that NYPA should be estopped from relying on the statute of limitations to bar plaintiffs' claims against it. Generally, New York does not allow the doctrine of estoppel to be applied against the government or a governmental entity. See Hamptons Hospital & Medical Center v. Moore, 52 N.Y.2d 88, 436 N.Y.S.2d 239, 241, 417 N.E.2d 533 (N.Y.1981). When, however, there is evidence that the governmental entity has acted "wrongfully or negligently ... inducing reliance' by plaintiffs to their detriment ...," a plaintiff may invoke the doctrine against that entity. Cabreaja v. New York City Health and Hosp. Corp., 201 A.D.2d 319, 607 N.Y.S.2d 633, 634 (1st Dept.1994) (quoting Bender v. New York City Health and Hosp. Corp., 38 N.Y.2d 662, 382 N.Y.S.2d 18, 20-21, 345 N.E.2d 561 (N.Y.1976)). This, however, is a limited exception. See Hamptons Hospital & Medical Center, 436 N.Y.S.2d at 241 n. 1, 417 N.E.2d 533.

Plaintiffs allege that NYPA's wrongful conduct in not apprising the millwrights of the alleged hazardous condition is enough to estop them from relying on the statute of limitations defense. Adopting the plaintiffs' position would consume the entire statute of limitations doctrine. To warrant application of the estoppel doctrine against the state, the claimant must rely to his detriment on some wrongful or negligent act of the state. Bender, 382 N.Y.S.2d at 21, 345 N.E.2d 561. For example, the state has been estopped from asserting that a timely notice of claim has not been filed where it failed to tell a claimant that the state entity with whom the claimant has been in litigation, and against whom it filed a timely notice, is no longer the correct defendant in such a suit. Id. at 19-20.

Plaintiffs further allege NYPA acted wrongfully through statements made by Hugh Gilmartin, an employee of NYPA, to Stephen Coli during Mr. Coli's investigation in the spring of 1992, which plaintiffs allege were calculated to dissuade Mr. Corcoran from filing a notice of claim. According to Mr. Coli's deposition testimony, Mr. Gilmartin essentially warned Mr. Coli that looking into the incident could cost Mr. Coli his job with Westinghouse. There is no evidence that Mr. Coli related the substance of his conversation with Mr. Gilmartin to Eugene Corcoran. Even if he had, Gilmartin's comments at most explain why Mr. Coli would choose not to further investigate. It could be argued that such a conversation, if conveyed to Mr. Corcoran, would have encouraged him to file a claim. These statements are therefore insufficient to raise a question that NYPA prevented Eugene Corcoran from filing a timely notice of claim. Additionally, plaintiffs have failed to produce any evidence that Eugene Corcoran relied on Gilmartin's statements or any information provided by NYPA in deciding not to file a notice of claim. Accordingly, the plaintiffs' claims against NYPA must be dismissed as barred by the statute of limitations.

Plaintiffs' Claims against Westinghouse

There is no dispute that during the time of Eugene Corcoran's alleged exposure to radiation he was an employee of Westinghouse. The Workers' Compensation Law states that

> [t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in the case of death, his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ.

N.Y.Work.Comp.Law § 29(6) (McKinney 1993). See also N.Y.Work.Comp.Law § 11 (McKinney 1992) ("The liability of an employer ... shall be exclusive and in place of any other liability..."). Employers, however, may be sued for intentional torts where their intentional or deliberate acts

were directed at causing harm to the plaintiff. See Gagliardi v. Trapp, 221 A.D.2d 315, 633 N.Y.S.2d 387, 388 (2d Dep't 1995) (internal citations omitted). See also Torres v. Pisano, 116 F.3d 625, 640 (2d Cir.1997); Acevedo v. Consolidate Edison, 596 N.Y.S.2d 68, 71 (1st Dep't 1993). Exposing an employee to a risk of injury, even a substantial injury, is insufficient to permit suit against an employer. Gagliardi, 633 N.Y.S.2d at 388. "A mere knowledge and appreciation of a risk is not the same as the intent to cause injury." Acevedo, 596 N.Y.S.2d at 71.

Plaintiffs allege that Westinghouse is liable for the intentional torts of battery and fraud, but have failed to produce evidence of any actions by Westinghouse that show a willful intent to harm Eugene Corcoran. [FN9] Even if plaintiffs' claims were not barred by the Workers' Compensation exclusivity provision, they would have to be dismissed as time-barred. The battery claim accrued upon the nonconsensual offensive contact, that is June 1985. See Plaza, 626 N.Y.S.2d at 451. Thus, plaintiffs' battery claim is barred by the one-year statute of limitations. N.Y.C.P.L.R. § 215(3). As discussed above, the plaintiffs' fraud claim is nothing more than a restatement of the battery claim and is accordingly also time-barred.

> FN9. In their opposition papers, plaintiffs raise a new claim by alleging that Westinghouse intentionally impaired Mr. Corcoran's claims against NYPA by organizing a safety meeting for the millwrights on June 25, 1985 at which NYPA health officials assured them that they were not and had not been in any danger. Even if this claim were properly before the Court, plaintiffs could not prevail on it against Westinghouse. First, the assurances at the June 25 meeting were given by NYPA and not Westinghouse. Second, plaintiffs have produced no evidence that Eugene Corcoran attended the safety meeting or relied on the information provided during that

meeting in making his decision not to file an action.

Conclusion

The defendants' motion for summary judgment is granted in its entirety. Plaintiffs' counter-motion for summary judgment is denied. The Clerk of Court shall enter judgment for the defendants. Both of the above-captioned actions shall be closed.

SO ORDERED:

Dated: New York, New York
September 26, 1997

s/
Denise Cote
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHEN DISTRICT OF NEW YORK

Carrie CORCORAN, as executrix of the estate of Eugene Corcoran, deceased, and Carrie Corcoran, Individually, Plaintiffs,

v.

NEW YORK POWER AUTHORITY and WEDCO CORP.

Defendants.

95 Civ. 5357(DLC)

OPINION

CARRIE CORCORAN, as executrix of the estate of Eugene Corcoran, deceased, and CARRIE CORCORAN, Individually,

Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant.

95 Civ. 8102(DLC).

May 27, 1998.

APPEARANCES:
For Plaintiffs:
Carrie Corcoran, Pro Se
8297 South Ridge Drive
Macungie, PA 18062

For Defendants
Wendy Fleishman, Esq.
SKADDEN ARPS SLATE MEAGHER & FLOM, LLP
919 Third Avenue
New York, NY 10022-3897

DENISE COTE, District Judge.

On March 15, 1995, Carrie Corcoran, on her own behalf and as Executrix of Eugene Corcoran's estate ("plaintiffs") filed this action against the New York Power Authority ("NYPA") and WEDCO Corporation ("Wedco") in state court, alleging that Ms. Corcoran's father had died as a result of exposure to radioactive contamination while working as a millwright at the Indian Point 3 nuclear power plant ("IP3"). Following a timely removal, the plaintiffs filed an amended complaint and filed a new action against Westinghouse Electric Corporation ("Westinghouse"), Mr. Corcoran's employer. On July 29, 1996, this Court granted in part and denied in part the defendants' motion to dismiss the plaintiffs' claims in the amended pleadings filed in both actions. Corcoran v. New York Power Auth., 935 F.Supp. 376 (S.D.N.Y.1996) ("Corcoran I "). On September 26, 1997, this Court granted summary judgment for the defendants on the claims that survived the issuance of Corcoran I. Corcoran v. New York Power Auth., 95 Civ. 5357/95 Civ. 8102, 1997 WL 603739 (S.D.N.Y. Sept.29, 1997) ("Corcoran II "). The plaintiffs have now filed a motion for reconsideration of Corcoran II.

Standard

Local Rule 6.3 requires a party moving for reconsideration to set forth controlling matters of law or fact that might materially have influenced the earlier decision. See Farkas v. Ellis, 783 F.Supp. 830, 833 n. 1 (S.D.N.Y.1992), aff'd, 979 F.2d 845 (2d Cir.1992). In Farkas, the Court held:

> Such motions may be granted only where the court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.

Id. at 832-33. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir.1997).

Background

This Court's prior Opinions, familiarity with which is assumed, set forth the procedural history of this litigation, as well as the factual setting for the plaintiffs' claims, and those will not be repeated here. Corcoran II principally addressed the statute of limitations defense asserted by the defendants and dismissed the plaintiffs' claims as barred by the New York State statute of limitations and related law. A brief description of the analysis contained in Corcoran II will assist in understanding the issues raised by the motion for reconsideration.

As described in Corcoran II, the plaintiffs' exclusive right of action is a public liability action or "PLA" under the Price Anderson Act. Under this federal statute, the substantive rules for decision of a PLA are derived from the law of the state in which the incident involving a nuclear facility occurred. This Court determined that the statute of limitations for a PLA should also be derived from state law, whether the statute of limitations is considered to be an issue of substantive or procedural law. To preserve any claims against NYPA, which is a public authority, a claimant is required by New York law to file a notice of claim within 90 days of the date on which the claim arises. After separately analyzing the accrual dates for each of the causes of action, the Court found that the notice of claim filed in this matter was untimely as to all causes of action. The Court also rejected the arguments offered by the plaintiffs to escape the application of the notice of claim requirement, that is, that they were entitled to file a late notice of claim and that the NYPA is estopped from relying on the statute of limitations bar.

Turning to the claims against Westinghouse, the Court held that the workers' compensation law provides the exclusive remedy for the injuries to Mr. Corcoran, who was its employee. While that law would not prevent suit for

intentional torts directed at causing harm to a plaintiff, the Court held that that theory, which had been raised for the first time in plaintiffs' papers submitted in opposition to the motion, did not apply as a factual matter, and in any event would not benefit the plaintiffs since even that claim was time barred.

Discussion

The plaintiffs argue that the Court erred in its analysis of the choice of law issues and that it overlooked a portion of their argument regarding the equitable estoppel doctrine. As to Westinghouse, the plaintiffs contend that the Court overlooked evidence and arguments which show that Westinghouse is liable for the intentional torts of battery and fraud. The plaintiffs also seek to reopen discovery and to add several new claims to the lawsuits.

1. Choice of Law

The plaintiffs argue that the statute of limitations for a PLA is properly designated a rule of procedural law and thus should be governed by federal law, which they argue requires this Court to fashion a uniform and neutral limitations period. The plaintiffs offer three possible sources for locating this uniform and neutral limitations period--(1) New York's general personal injury and general property damage statute, N.Y.C.P.L.R. § 214, (2) the federal Comprehensive Environmental Response, Compensation, and Liability statute ("CERCLA"), 42 U.S.C. § 9658(a)(1), or (3) the Price Anderson Act's provision creating a statute of limitations period for an "extraordinary nuclear occurrence", 42 U.S.C. § 2210(n)(1). After discussing each of these three sources, the plaintiffs argue that New York law should apply. The plaintiffs further argue that the Court should apply federal rules to determine when a cause of action accrued and for the doctrines of equitable tolling (a doctrine which is raised by the plaintiffs for the first time in the

instant motion) and equitable estoppel. The plaintiffs acknowledge that they did not brief these issues in connection with the summary judgment motion and are now bringing to the Court's attention authorities that they did not previously cite. Since these issues and authorities were not presented by the plaintiffs through their summary judgment papers, they may not be litigated through a motion for reconsideration. In any event, the plaintiffs' analysis is flawed.

As described in Corcoran II, because the Price Anderson Act specifically states that substantive rules of decision are to be governed by state law and because the Act does not contain its own limitations provision, New York law provides the limitations period whether the statute of limitations is properly considered substantive or procedural. That being the case, the plaintiffs cannot select certain New York law, which they believe to be more favorable, and ignore other New York law which has the effect of barring their action.

Moreover, while state law notice of claim provisions have been found on occasion to be inconsistent with a federal statutory scheme, in each instance where a court has so found, the federal statutory scheme supplied the substantive law that governed the issues in the litigation. See, e.g., Brown v. United States, 742 F.3d 1498, 1503 (D.C.Cir.1984) (en banc) (Section 1983 action); American Tel. & Tel. v. NYC Dept. of Human Res., 736 F.Supp. 496, 501 (S.D.N.Y.1990) (action brought pursuant to The Communications Act). Here, Congress has determined that the law of each state will supply the rule of decision in the case. The notice of claim provision on which defendants' rely does not merely bar the remedy for a violation, but is actually a condition on the right itself. See Piesco v. City of N.Y., Dept. of Personnel, 650 F.Supp. 896, 900 (S.D.N.Y.1987) (construing notice of claim provisions), rev'd on other grounds, 933 F.2d 1149 (1991); Davidson v. Bronx Muni. Hospital, 64 N.Y.2d 59, 484 N.Y.S.2d 533, 534, 473 N.E.2d 761 (N.Y.1984) (per curiam).

Cf. Felder v. Casey, 487 U.S. 131, 152, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (federal law pre-empts state law, particularly notice of claim provisions, in Section 1983 actions in part because such provisions are "substantive condition[s] on the right to sue"). In such circumstances, there is no inconsistency with the federal statutory framework to apply the notice of claim requirements under state law, as well as other state law rules that bar late filed actions. Cf. Nieman v. NLO, Inc., 108 F.3d 1546, 1561-2 (6th Cir .1997) (in dicta finding state law "discovery" rules not inconsistent with Price Anderson Act).

2. Equitable Estoppel

The plaintiffs contend that the Court overlooked a portion of their argument when it rejected their equitable estoppel defense to the application of the statute of limitations. Specifically, they contend that the NYPA wrongfully induced reliance by Mr. Corcoran by failing to monitor his radiation dosage and to notify him of the reading as it was required to do by federal regulations. The plaintiffs indicate that they will prove such a failure to monitor and notify by proving that Mr. Corcoran's illness was due to exposure to radiation and that he never received notice of such exposure. Contrary to the plaintiffs' contention, the Court did consider this argument when it rejected their equitable estoppel argument. The Court stated,

> [p]laintiffs allege that NYPA's wrongful conduct in not apprising the millwrights of the alleged hazardous condition is enough to estop them from relying on the statute of limitations defense. Adopting the plaintiffs' position would consume the entire statute of limitations doctrine. To warrant application of the estoppel doctrine against the state, the claimant must rely to his detriment on some wrongful or negligent act of the state.

Corcoran II, at * 7 (citation omitted). In any event, the plaintiffs have still not identified any action of the NYPA on

which the plaintiff relied to his detriment; they have only outlined a theory of reliance based on the failure of the NYPA to act. Because the plaintiffs have not pointed to any argument or authority previously presented to and overlooked by the Court, the motion for reconsideration must be denied.

3. Westinghouse

The Court ruled in Corcoran II that the plaintiffs had failed to produce evidence of any actions by Westinghouse that showed a willful intent to harm Eugene Corcoran. Such a showing is necessary to prove an intentional tort and escape the law which makes a workman's compensation claim Mr. Corcoran's exclusive remedy. The plaintiffs contend that they did provide such evidence to the Court and that the Court erred in finding that the assurances given at a June 25, 1985 safety meeting for millwrights were given by NYPA and not by Westinghouse. [FN1] Moreover, the plaintiffs argue that their theory of wrongdoing by Westinghouse, which they introduced as a new claim in their opposition to summary judgment, was not based on the failure to warn Mr. Corcoran of the radiation danger at the June 25 meeting, but rather on the existence of a broader conspiracy to deprive millwrights of personal monitoring devices, a conspiracy in which Westinghouse and NYPA acted together to conceal from the millwrights the danger to them from exposure to radiation. Even this formulation of the plaintiffs' theory of liability does not succeed, however, in overcoming the additional hurdle identified in Corcoran II, to wit, that these claims are barred by the statute of limitations which applies to battery actions and to derivative fraud claims. Thus, accepting as true the plaintiffs' contention that this Court overlooked the full import of the plaintiffs' prior argument, and that a motion for reconsideration should be granted, the result remains the same. The claims against Westinghouse for intentional torts are time barred.

FN1. The plaintiffs point to the affidavit of millwright Darren Stevens, which refers to statements made at the June 25, 1985 meeting by Steven Tencza--a Westinghouse, not NYPA, employee.

4. Discovery

The plaintiffs argue that the Court should not have ruled on their claims against Westinghouse because they needed additional discovery regarding their conspiracy claims and that the Court overlooked Ms. Corcoran's detailed statement of the discovery needed. Accepting the plaintiffs' contention that the Court overlooked the need for further discovery, the Court grants the motion for reconsideration on this point. Upon reconsideration, however, the Court finds that this additional discovery would not assist the plaintiffs in addressing the ultimate finding that any claim against Westinghouse for intentionally tortious conduct is time barred.

5. New Claims

Finally, the plaintiffs ask this Court to allow them to plead new claims and to continue the litigation on these new theories. They wish to add claims for prima facie tort, and for violation of Mr. Corcoran's civil rights under Sections 1983, 1985, and 1986 of Title 42, United States Code. It is simply too late for the plaintiffs to amend their complaints to add these new claims.

Since filing this action in 1995, the plaintiffs have amended their claims in the NYPA action on two occasions and in the Westinghouse action on one occasion. Moreover, the Court has considered and addressed claims raised in the plaintiffs' papers in opposition to the summary judgment motion which did not appear in the pleadings. The Court has also carefully considered two substantial substantive motions in

this case: the 1996 motion to dismiss and the 1997 summary judgment motion. The parties have gone through extensive discovery addressed to the statute of limitations issues, including fourteen depositions. Given this extensive history, it would be inappropriate to allow the plaintiffs to begin this litigation afresh through a motion to reconsider a decision which granted judgment to the defendants. In any event, the plaintiffs have filed a new action--97 Civ. 9286--which raises some, if not all, of these additional claims and in which a motion to dismiss is currently pending.

Conclusion

The plaintiffs' motion to reconsider the decision of September 26, 1997 is denied, except for that portion of the motion addressed to the claims against Westinghouse and the need to reopen discovery on those claims. Having reconsidered the arguments raised regarding the plaintiffs' claims against Westinghouse, the decision of September 26, 1997 remains unchanged.

SO ORDERED.

Dated: New York, New York
May 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: April 21, 1999 Decided: September 29, 1999)

Docket No. 98-7945

CARRIE CORCORAN, as Executrix of the Estate of EUGENE CORCORAN, deceased, and CARRIE CORCORAN, individually,

Plaintiffs-Appellants,

—v.—

NEW YORK POWER AUTHORITY, WEDCO CORP., and WESTINGHOUSE ELECTRIC CORPORATION,

Defendants-Appellees.

Before:

KEARSE, MCLAUGHLIN, and CALABRESI,

Circuit Judges.

Plaintiffs appeal from an order of the United States District Court for the Southern District of New York (Cote, *J.*), granting defendants' motion for summary judgment.

AFFIRMED.

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CARRIE CORCORAN, *pro se*, Macungie, Pa., *for Plaintiffs-Appellants*.

DONALD E. JOSE, Jose & Wiedis, West Chester, Pa. (Sheila L. Birnbaum, Peter J. McKenna, Wendy Fleishman, Skadden, Arps, Slate, Meagher & Flom LLP, New York, N.Y., *of counsel*), *for Defendants-Appellees*.

MCLAUGHLIN, *Circuit Judge*:

BACKGROUND

Because this case arises on appeal from a grant of summary judgment for defendants, we must view the evidence in the light most favorable to the plaintiffs, the nonmoving parties. With that in mind, we set forth the facts as follows.

Eugene Corcoran repaired machinery as a millwright for Westinghouse Electric Corporation ("Westinghouse"). Between June and August 1985, Mr. Corcoran was assigned to work temporarily at the Indian Point 3 Nuclear Power Plant ("IP3"). IP3 is a federally-licensed plant with an operating license held by the New York Power Authority ("NYPA"), a state agency. Mr. Corcoran performed maintenance work on the steam turbine, including the "stop valve." In 1985, the steam generator tubes that carried radioactive water leaked radioactive particles and substances into the stop valve. Westinghouse and NYPA neither alerted Mr. Corcoran to the presence of radiation nor provided him with protective clothing or radiation monitoring equipment.

Mr. Corcoran was exposed to radiation in excess of the permissible occupational dose limits for workers in restricted areas of nuclear power plants. Westinghouse and NYPA failed to notify Mr. Corcoran that he had been exposed to radiation or administer medical tests to assess the level of radiation exposure.

Sometime in June 1985—the very first month of his assignment to IP3—Mr. Corcoran experienced radiation sickness. At the time, however, his symptoms were not diagnosed as resulting from radiation exposure; neither did Mr. Corcoran associate the illness with radiation. For several years following this episode, Mr. Corcoran continued to suffer from an illness of unexplained etiology.

About seven years later, on March 16, 1992, Mr. Corcoran was told by his oncologist, Dr. Romeo Balagot, that he had chronic myeloid leukemia ("CML"), a fatal disease of the blood and immune systems. While exploring Mr. Corcoran's occupational history, Dr. Balagot informed Mr. Corcoran that exposure to radiation was a possible cause of leukemia. Four days later, Mr. Corcoran went to a second oncologist, Dr. Nirmala Shevde, who confirmed the fatal diagnosis.

In the following two or three months, Mr. Corcoran and his ex-wife, Carol Ellis, discussed filing a radiation claim. Ellis believed that Mr. Corcoran's leukemia may have been caused by radiation exposure. On two or three occasions she urged him to consult a lawyer.

Sometime in the summer of 1992, Mr. Corcoran called Stephen Coli, a co-worker at IP3, asking Coli to investigate whether Corcoran had been exposed to radiation at IP3. Hugh Gilmartin, a NYPA employee, told Coli not to "drag things up." Coli reported to Mr. Corcoran that his investigation had led to a "dead end" and discouraged Mr. Corcoran from pursuing a claim.

In an effort to cure the disease, Mr. Corcoran had a bone marrow transplant in March 1993. The transplant failed to arrest the spread of leukemia. Mr. Corcoran died on September 25, 1993.

In January 1994, Mr. Corcoran's daughter, Carrie Corcoran ("Ms. Corcoran") and Ellis consulted several lawyers about bringing a lawsuit. Lawyers from Kreindler & Kreindler posted a notice in the millwright's union hall, seeking information from anyone who knew about radiation leaks at IP3 in 1985. On April 5, 1994, Ms. Corcoran filed a notice of claim with NYPA, claiming damages for Mr. Corcoran's injuries and wrongful death.

Nine months later, Coli called the lawyers in response to the union hall notice. On March 15, 1995, based on what Coli told them, Kreindler & Kreindler sued on behalf of Ms. Corcoran, individually and as executrix of Mr. Corcoran's estate. The defendants were NYPA and WEDCO Corporation (a Westinghouse subsidiary). The suit was in a New York state court (the "NYPA action"). Kreindler & Kreindler later withdrew and Ms. Corcoran proceeded *pro se*.

NYPA and WEDCO removed the action to the United States District Court for the Southern District of New York (Cote, *J.*), in July 1995. One month later, NYPA and WEDCO moved to dismiss the action pursuant to Fed. R. Civ. P. 12. In response, Ms. Corcoran filed a motion "to estop defendant, New York Power Authority, from asserting an affirmative defense regarding the statute of limitations on the plaintiffs' notice of claim or plaintiffs' action" (the "Estoppel motion"). Ms. Corcoran filed an Amended Complaint in the NYPA action and commenced a separate, new action against Westinghouse (the "Westinghouse action").

In response to the Estoppel motion, NYPA cross-moved for summary judgment, arguing that plaintiffs' claims against

NYPA were barred by Mr. Corcoran's failure to file a timely notice of claim. Ms. Corcoran responded to the Rule 12 motions and also sought leave of Court to substitute Westinghouse for WEDCO or, in the alternative, an order consolidating the NYPA and Westinghouse actions.

The two actions were consolidated as *Corcoran v. New York Power Auth.*, Nos. 95 Civ. 5357, 95 Civ. 8102 (DLC). One month later, NYPA, WEDCO, and Westinghouse moved to dismiss the Amended Complaint against NYPA and the Complaint against Westinghouse pursuant to Fed. R. Civ. P. 12. In December 1995, Ms. Corcoran filed an Amended Complaint against Westinghouse. She filed a Second Amended Complaint against NYPA three weeks later.

The amended complaints against NYPA and Westinghouse contained five groups of allegations:

- *First*, Ms. Corcoran alleged that NYPA wrongfully caused Mr. Corcoran's death by negligently "owning, operating, controlling, supervising, surveying, monitoring, maintaining and managing the possession and use of nuclear material" at IP3, and by negligently misrepresenting and failing to warn Mr. Corcoran about the safety of IP3.

- *Second*, NYPA and Westinghouse engaged in a barrage of intentional tortious conduct when they failed to monitor Mr. Corcoran's exposure to radiation, knowingly failed to correct industrial practices which led to Mr. Corcoran's exposure, failed to conduct radiation surveys in Mr. Corcoran's work area, "intentionally assigned [Mr. Corcoran] to work in and around the dangerously radioactive area without the benefit of equipment that would warn and/or protect him from the dangers present," and failed to

notify Mr. Corcoran that he had been exposed to excessive levels of radiation.

- *Third*, NYPA and Westinghouse violated federal regulations and statutes governing the handling of radioactive materials and the protection of employees working with these materials.
- *Fourth*, NYPA and Westinghouse conspired to defraud Mr. Corcoran by concealing that he had been exposed to excessive radiation.
- *Fifth*, Ms. Corcoran asserted a survival action on behalf of her father, seeking to recover damages for the injuries he suffered prior to his death.

Defendants moved to dismiss both the Second Amended Complaint and the Amended Westinghouse Complaint under Rule 12(b). Judge Cote converted the motion to one for summary judgment and granted the motion in part, and denied it in part. *See Corcoran v. New York Power Auth.*, 935 F. Supp. 376 (S.D.N.Y. 1996) ("*Corcoran I*"). She held that because Mr. Corcoran's claims arose out of a nuclear incident, plaintiffs' exclusive right to recover was in a "public liability action" under 42 U.S.C. § 2210(n)(2) of the Price-Anderson Amendments Act of 1988 ("Price-Anderson"). *See Corcoran I*, 935 F. Supp. at 383-85.

Price-Anderson expressly mandates that state law provide the substantive law to govern a public liability action. *See* 42 U.S.C. § 2014(hh). Accordingly, Judge Cote focused on Ms. Corcoran's allegations to determine whether any of them had a state law counterpart and thus stated a claim upon which relief could be granted under Price-Anderson. (Judge Cote dismissed Ms. Corcoran's claims asserting violations of various federal regulations and statutes, ruling that these claims did not state a cause of action under Price-Anderson).

See Corcoran I, 935 F. Supp. at 388-89. Continuing her analysis of New York law, Judge Cote held that: (1) the negligence allegations were cognizable under New York's law of negligence; (2) the claims alleging intentional exposure to radiation were analogous to New York state law governing claims for battery (the "battery claim"); (3) the conspiracy to defraud allegation sufficed to state a cause of action for fraud under New York law (the "fraud claim"); and (4) the survival action was cognizable under New York law. *See id.* at 387-390. Judge Cote then allowed the parties limited discovery to determine whether the claims based on state tort law were barred by the applicable statutes of limitations.

Following completion of this limited discovery, Judge Cote granted defendants' motion for summary judgment. *See Corcoran v. New York Power Auth.*, Nos. 95 Civ. 5357, 95 Civ. 8102, 1997 WL 603739, at *9 (S.D.N.Y. Sept. 29, 1997) ("*Corcoran II*"). Judge Cote found that plaintiffs had failed to file a timely notice of claim against NYPA, as required by N.Y. Gen. Mun. Law § 50-e (McKinney 1999) and N.Y. Pub. Auth. Law §§ 1017(2), 2980 (McKinney 1994) (requiring a notice of claim as a condition precedent for actions against NYPA). Therefore, all claims against NYPA were barred. Judge Cote rejected Ms. Corcoran's arguments for equitable estoppel and permission to treat the April 4, 1994 notice of claim as a late-filed notice of claim under N.Y. Gen. Mun. Law § 50-e(5). *See Corcoran II*, 1997 WL 603739, at *6-8.

The claims against Westinghouse were dismissed on the ground that New York Workers' Compensation Law provided the exclusive remedy for unintentional torts and Ms. Corcoran failed to produce evidence of intentional tortious acts by Westinghouse. *See id.* at *8. Judge Cote further ruled that even if Ms. Corcoran could have adduced evidence supporting a fraud or battery claim against Westinghouse,

such claims would have been barred in New York by the one-year statute of limitations governing battery actions, N.Y. C.P.L.R. § 215(3) (McKinney 1993).

Ms. Corcoran moved for reconsideration, arguing that Judge Cote erred when she: (1) applied New York's notice of claim requirement to bar the claims against NYPA; and (2) overlooked evidence and arguments showing that Westinghouse was liable for the intentional torts of battery and fraud. *See Corcoran v. New York Power Auth.*, No. 95 Civ. 5357, 1998 WL 274290, at *2 (S.D.N.Y. May 27, 1998) ("*Corcoran III*"). Ms. Corcoran also moved to amend her complaint to add new causes of action for violations of 42 U.S.C. §§ 1983, 1985, and 1986. While these motions were pending, Ms. Corcoran commenced a new action in the Southern District against NYPA, Westinghouse, and several individual defendants, alleging violations of §§ 1983, 1985, and 1986. *See Corcoran v. Sinclair*, No. 97 Civ. 9286 (DLC), 1999 WL 177444 (S.D.N.Y. March 30, 1999) ("*Corcoran IV*").

Judge Cote denied both the motion for reconsideration and the motion to amend. *See Corcoran III*, 1998 WL 274290, at *4-5. Judge Cote reaffirmed her previous holdings that: (1) New York's notice of claim requirement barred the claims against NYPA; (2) NYPA was not equitably estopped from asserting the notice of claim requirement; and (3) Ms. Corcoran's intentional tort claims against Westinghouse were time-barred. *See id.* at *2-4. Judge Cote denied Ms. Corcoran's request to amend the complaint, reasoning that the request was untimely and, in any event, Ms. Corcoran had commenced a new action raising these claims. *See id.* at *4.

Ms. Corcoran now appeals, arguing that Judge Cote erred when she: (1) granted summary judgment in favor of NYPA

and Westinghouse; and (2) denied the request to amend the complaint.

DISCUSSION

We review Judge Cote's decision to grant summary judgment *de novo*. *See Bedoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir. 1996).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[W]e read the pleadings of a *pro se* plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest.'" *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)).

I. *The Price-Anderson Act*

Congress took the first step toward establishing a comprehensive federal framework governing the nuclear power industry in 1946 when it passed the Atomic Energy Act of 1946. *See* Act of Aug. 1 1946, ch. 724, 60 Stat. 755 (1946). The Act "contemplated that the development of nuclear power would be a Government monopoly." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978).

Eight years later, Congress determined that it was in the public interest to encourage private sector participation in the nuclear power industry. Congress thus enacted the Atomic

Energy Act of 1954 ("AEA"), Act of Aug. 30 1954, ch. 1073, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2281) (1994 & Supp. 1999), which provided for the "licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC)." *Duke Power*, 438 U.S. at 63.

Private power companies remained reluctant to invest in nuclear facilities because of the potentially astronomical liability costs. To address that problem, in 1957 Congress enacted the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (codified as amended at 42 U.S.C. § 2210) (1994 & Supp. 1999) ("Price-Anderson"). Price-Anderson contained three main features. First, it established a limit on the aggregate liability of those who wished to undertake activities involving the handling of nuclear material. Second, it channeled public liability resulting from nuclear incidents to the federal government. Finally, it provided that all public liability claims above the amount of required private insurance would be indemnified by the federal government. *See id.*

After several additional changes to the statute, Congress passed the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1069, creating an *exclusive* federal cause of action for radiation injury. The statute defines a "public liability action" ("PLA") "as any suit asserting public liability" growing out of exposure to nuclear radiation. 42 U.S.C. § 2014(hh). "Public liability," in turn, is defined as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation," except for certain claims covered by workers' compensation, incurred in wartime, or that involve the licensed property where the nuclear incident occurs. *Id.* § 2014(w). Most importantly, Congress required that the substantive rules of decision in a PLA "shall be derived from the law of the State in which the

nuclear incident involved occurs, unless such law is inconsistent with the provisions of" section 2210 of Price-Anderson. *Id.* § 2014(hh).

II. *Claims against NYPA*

Ms. Corcoran raises three challenges to Judge Cote's dismissal of her claims against NYPA. First, she asserts that Judge Cote erred by applying New York's notice of claim requirement to bar an action under Price-Anderson, a federal statute. Second, Ms. Corcoran contends that Judge Cote erred when she applied New York rules governing accrual and tolling to determine that Ms. Corcoran's claims were not timely. Finally, she argues that Judge Cote should have equitably tolled the statute of limitations because NYPA and Westinghouse prevented Mr. Corcoran from discovering his exposure. There is a question as to whether these arguments have been waived.

A. *Waiver*

As a threshold matter, NYPA argues that Ms. Corcoran waived several legal arguments supporting her challenge to Judge Cote's decision. NYPA contends that these arguments were untimely because Ms. Corcoran raised them after summary judgment briefs had been filed. Because Ms. Corcoran is a *pro se* litigant, because her arguments present purely legal questions, and because Judge Cote addressed these arguments, albeit in *dicta*, we choose to overlook any alleged waiver. *See Austin v. Healey*, 5 F.3d 598, 601 (2d Cir. 1993); *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 80 (2d Cir. 1993).

B. *New York's Notice of Claim Requirement*

Ms. Corcoran raises three points to support her contention that Judge Cote erred when she applied New York's notice of

claim requirement to bar the claims against NYPA. First, Ms. Corcoran maintains that applying a notice of claim provision to bar recovery under a federal statute violates the Supremacy Clause of the United States Constitution. Second, she asserts that New York's notice of claim requirement is inconsistent with Price-Anderson because it allows state-owned nuclear power plant operators, but not private operators, to escape liability. Finally, she contends that New York's notice of claim requirement frustrates Price-Anderson's goal of ensuring compensation to injured plaintiffs.

1. *Supremacy Clause*

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State and local laws are thus preempted when they conflict with federal law. *See National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998).

Requiring the filing of a timely notice of claim in a Price-Anderson action does not violate the Supremacy Clause. Price-Anderson is not a self-sufficient body of federal law. Rather, "the substantive rules for decision . . . shall be derived from the law of the State in which the nuclear accident involved occurs, unless such law is inconsistent with the provisions of" section 2210 of Price-Anderson. 42 U.S.C. § 2014(hh). By providing that the substantive rules of decision are derived from state law, "Congress expressed its intention that state law provides the content of *and operates as federal law*." *In re TMI II*, 940 F.2d 832, 855 (3d Cir. 1991) (emphasis added); *see O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir. 1994). Because the substantive rules of decision "operate[ ] as federal law," there

is no conflict and the Supremacy Clause is simply not implicated.

2. *"Glaring Inconsistency"*

Plaintiff suggests that requiring a notice of claim imposes different standards of liability on private and public nuclear power plant operators. She notes that while IP3 is owned and operated by NYPA, a state agency, the adjoining nuclear power plant, IP2, is owned by Consolidated Edison, a corporation. She claims that requiring a notice of claim would create a "glaring inconsistency" because a worker injured in IP3 would be required to file a notice of claim, but a worker injured in IP2 would not be similarly burdened. We implicitly rejected this argument in *Hardy v. New York City Health & Hospitals Corp.*, 164 F.3d 789 (2d Cir. 1999), and explicitly reject it here.

In *Hardy*, we held that the Emergency Medical Treatment and Active Labor Act ("EMTALA") required the application of New York's notice of claim provision to actions seeking redress for violations of that federal statute. *See id.* at 794. By requiring EMTALA plaintiffs to file a notice of claim against municipal hospitals, but not private hospitals, we accepted the premise that imposing different requirements on suits by similarly-situated plaintiffs does not create an inconsistency sufficient to reject adopting a notice of claim requirement. We see no compelling reason to depart from this reasoning in Price-Anderson actions.

3. *Frustrating Price-Anderson's Purposes*

Plaintiff contends that Price-Anderson adopts state substantive law only to the extent it is consistent with the provisions of 42 U.S.C. § 2210 and that requiring the filing of a timely notice of claim is inconsistent with § 2210. We disagree.

Plaintiff cannot point to a specific provision in § 2210 that is inconsistent with requiring the filing of a timely notice of claim. Indeed, the only provision of § 2210 that is close to creating a problem is § 2210(n)(1), which authorizes the Atomic Energy Commission to require its contractors to waive any "issues or defense," such as the notice of claim requirement, in the event of an "extraordinary nuclear occurrence" ("ENO"). 42 U.S.C. § 2210(n)(1). It is undisputed that Ms. Corcoran's claim does not arise out of an ENO—"an[ ] event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite." 42 U.S.C. § 2014(j). Her claims arise out of a less dramatic accident. Requiring a timely notice of claim in this case does not conflict with § 2210(n)(1). Accordingly, Judge Cote's decision to apply this state law requirement was consistent with the plain terms of the statute. *Cf. Lujan v. Regents of the Univ. of Cal.*, 69 F.3d 1511, 1518 (10th Cir. 1995).

Ascending to a more philosophical plane, plaintiff appears to suggest that the 1988 amendments to Price-Anderson show Congress's intent to facilitate recovery under the Act. Because New York's notice of claim requirement would impede recovery, Ms. Corcoran asserts that applying this state law requirement would be inconsistent with the federal policy embodied in the Act. We disagree because: (1) the plain terms of Price-Anderson mandate application of New York's notice of claim requirement; and (2) applying New

York's notice of claim requirement does not sufficiently conflict with the statute's laudable purposes.

"Our task . . . is to effectuate the terms of the statute as written, not to give effect to some broad, amorphous federal policy." *Id.*; *cf. Skubel v. Fuoroli*, 113 F.3d 330, 335 (2d Cir. 1997). The statutory language is clear—state law provides the substantive rules for decision in PLAs unless it is "inconsistent with the *provisions* of" section 2210. 42 U.S.C. § 2014(hh) (emphasis added); *see Lujan*, 69 F.3d at 1518. We see no inconsistency between permitting waiver of the notice of claim requirement in PLAs arising out of an ENO and still insisting upon a notice of claim in PLAs arising out of less serious nuclear incidents. *Cf. id.* "Congress may have concluded that the problems of proof associated with lesser nuclear accidents, which are not always easily identified, outweigh a plaintiff's right to full compensation." *Id.*

Even if we look to the purposes underlying the 1988 amendments to Price-Anderson, as plaintiff directs, we do not perceive a conflict sufficient to justify departing from New York's notice of claim requirement.

Congress enacted Price-Anderson to: (1) ensure that adequate funds would be available to satisfy liability claims in the event of a nuclear accident; and (2) encourage private sector participation in the atomic energy industry by reducing the threat of potentially enormous liability arising out of the operation of an atomic energy plant. *See El Paso Natural Gas Co. v. Neztsosie*, ___ U.S. ___, 119 S. Ct. 1430, 1433 (1999); *Duke Power*, 438 U.S. at 64.

Admittedly, requiring a timely notice of claim creates a potential barrier to recovery. If this barrier were insurmountable, or deprived injured plaintiffs of an adequate recovery, the notice of claim requirement might indeed be inconsistent with the purposes underlying Price-Anderson.

See McLandrich v. Southern Cal. Edison Co., 942 F. Supp. 457, 466-67 (S.D. Cal. 1996); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984) (Congress "disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those who are injured by exposure to hazardous nuclear materials."). However, that is just not the case here.

First, compliance with the notice of claim requirement is practicable. Under New York's "discovery rule," N.Y. C.P.L.R. § 214-c(3) (McKinney 1990 & Supp. 1999), a plaintiff asserting a personal injury claim based on the latent effects of radiation exposure must file a notice of claim within ninety days of "the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier." *Id.* The ninety-day period begins to run on the date plaintiff became "aware of the primary condition for which damages are sought." *Whitney v. Quaker Chem. Corp.*, 660 N.Y.S.2d 862, 863 (N.Y. 1997); *see Krogmann v. Glens Falls City Sch. Dist.*, 661 N.Y.S.2d 82, 83 (3d Dep't 1997).

Although the 90-day period begins to run despite a plaintiff's ignorance about the *cause* of his injury, it can hardly be disputed that radiation exposure is harmful and causes diseases like leukemia.[1] By triggering the notice of claim period when the plaintiff becomes aware that he has an injury, New York law affords Price-Anderson plaintiffs a reasonable opportunity to comply with the notice of claim requirement.

[1] We are not faced with a situation involving a harm that could not reasonably be known to have been caused by exposure to a toxic substance within the relevant ninety days. It can hardly be disputed that it has long been scientifically known that radiation exposure causes leukemia. Therefore, unlike our concurring colleague, we see no need to reach an issue that is not presented by the facts of this case.

Because the notice of claim requirement does not unduly impair a Price-Anderson plaintiff's ability to recover, it is not inconsistent with the statute's compensatory purpose. *See Lujan*, 69 F.3d at 1518.

It should also be noted that any difficulty experienced in attempting to comply with this requirement is somewhat ameliorated by the plaintiff's ability to request permission to file a late notice of claim. *See* N.Y. Gen. Mun. Law. § 50-e(5) (McKinney 1999). The appropriate state court may extend the time to file a notice of claim until the relevant statute of limitations expires, even if the action has already been commenced. *See id.* § 50-e. Therefore, a Price-Anderson plaintiff who fails to file a notice of claim within ninety days of the claim's accrual can still maintain his action if the state court permits a late filing of the notice. *See Hardy*, 164 F.3d at 795. Ms. Corcoran sought late-filing permission from the district court, which denied her request, stating, in part that a federal court "does not have jurisdiction to grant leave to file a late notice of claim" in light of § 50-e's provision that " 'All [such] applications . . . shall be made to the county court.' " *Corcoran II*, 1997 WL 603739, at *6. We need not decide here whether the federal court has such jurisdiction, however, because the district court went on to conclude that even if it had jurisdiction it would deny Ms. Corcoran's request on its merits. *See id.* at *6-7. We see no error in the latter conclusion. While Ms. Corcoran's attempt to avail herself of this procedural protection was unsuccessful, her failure does not compel the conclusion that New York's statutory regime is inherently unjust or even unfair.

To the contrary, New York's notice of claim requirement actually furthers one of Price-Anderson's purposes—ensuring that adequate funds are available to satisfy meritorious claims. The notice of claim requirement " 'afford[s] the municipality an adequate opportunity to investigate the claim

in a timely and efficient manner and, where appropriate, to settle claims without the expense and risks of litigation.' " *Hardy*, 164 F.3d at 794 (quoting *Fincher v. County of Westchester*, 979 F. Supp. 989, 1002 (S.D.N.Y. 1997)). Prompt investigation allows the State to make a more reasoned determination of the claim's validity. This protects the limited indemnification fund from being diluted by unwarranted claims. *Cf. Davidson v. Bronx Mun. Hosp.*, 484 N.Y.S.2d 533, 535 (N.Y. 1984); *Altmayer v. City of New York*, 540 N.Y.S.2d 459, 460 (2d Dep't 1989).

In sum, we find no rational basis for avoiding a clearly applicable rule of law. A timely notice of claim must be filed in a Price-Anderson litigation. We turn next to consider whether plaintiff complied with this requirement.

C. *Ms. Corcoran's Failure to File a Timely Notice of Claim*

Judge Cote properly held that plaintiff failed to file a timely notice of claim. Mr. Corcoran became "aware of the primary condition for which damages are sought," *Whitney*, 660 N.Y.S.2d at 863, on either March 16, 1992, when Dr. Balagot diagnosed him with CML and "discussed . . . radiation exposure" as a possible cause of CML, or, at the latest, four days later when Dr. Shevde confirmed the diagnosis. Ms. Corcoran's April 1994 notice of claim was filed nearly one and one-half years too late for her negligence claim. *See Perry v. City of N.Y.*, 656 N.Y.S.2d 301, 302 (2d Dep't 1997).

The notice of claim for battery was also untimely because, as held in *Plaza v. Estate of Wisser*, 626 N.Y.S.2d 446, 451 (1st Dep't 1995), it does not get the benefit of C.P.L.R. 214-c(3)'s discovery rule and it was filed almost nine years after Mr. Corcoran's exposure to radiation.

The fraud claim is similarly barred. The ninety-day period began to run either when the fraud was committed or at the time the fraud was, or could reasonably have been, discovered. *See Bennett Silvershein Assocs. v. Furman*, No. 91 Civ. 3118, 1997 WL 531310, at *7 (S.D.N.Y. Aug. 28, 1997). The fraud claim against NYPA arose either in June 1985 when NYPA concealed the exposure from Mr. Corcoran or, at the latest, in March 1992 when Mr. Corcoran discovered his illness and with reasonable diligence could have discovered the alleged fraud. Therefore, the April 1994 notice of claim was untimely.

Finally, because all Mr. Corcoran's claims were barred by his failure to file a timely notice of claim, Ms. Corcoran's wrongful death and survival actions are similarly barred. It is a condition precedent to wrongful death and survival actions that the decedent's claim must have been viable at the time of death. *See* N.Y. Est. Powers & Trusts Law § 11-3.2(b) (McKinney Supp. 1999); *Kelliher v. New York Cent. & H.R.R. Co.*, 212 N.Y. 207, 212 (N.Y. 1914).

Judge Cote properly dismissed the claims against NYPA because of Ms. Corcoran's failure to file a timely notice of claim. We see no need to consider whether, as Judge Cote held, these claims were also time-barred under the applicable statutes of limitations.

III. *Claims against Westinghouse*

Mr. Corcoran's injuries obviously occurred within the scope of his employment with Westinghouse. Therefore, New York Workers' Compensation Law provides the *sole* recourse for unintentional torts by Westinghouse. *See* N.Y. Work. Comp. Law §§ 11, 29(6) (McKinney Supp. 1999). Workers' Compensation, however, does not apply under New York law when the employer engages in conduct constituting an intentional tort. *See id.*; *Acevedo v. Consolidated Edison Co. of*

N.Y., 596 N.Y.S.2d 68, 70-71 (1st Dep't), *leave to appeal dismissed*, 602 N.Y.S.2d 806 (N.Y. 1993). In addition to negligence claims, Ms. Corcoran asserted that Westinghouse: (1) intentionally exposed Mr. Corcoran to radiation; and (2) intentionally concealed knowledge of the exposure from Mr. Corcoran. Judge Cote characterized these claims as causes of action for "battery" and "fraud" under New York law. Judge Cote found that New York's one-year statute of limitations governing battery actions applied to both the fraud and battery claims because the fraud claim was "incidental" to the battery. Both claims were held to be time-barred under the one-year limitations period. Plaintiff challenges the dismissal of these claims.

A. *Dismissal of the "Battery" Claim*

Ms. Corcoran raises two challenges to Judge Cote's dismissal of the battery claim. First, she contends that Judge Cote should have applied New York's three-year statute of limitations for personal injury actions to determine the timeliness of the battery claim. Second, she maintains that her battery claim would be timely under federal rules governing accrual and tolling and Judge Cote thus erred by applying state law accrual and tolling rules. We disagree.

1. *Appropriate Statute of limitations*

Plaintiff argues that Judge Cote erred when she applied New York's one-year statute of limitations to bar the battery claim. She asserts that Judge Cote should have applied N.Y. C.P.L.R. § 214(5), New York's three-year statute of limitations for personal injury actions, to her battery claim because: (1) personal injuries are analogous to radiation poisoning; and (2) applying the one-year statute of limitations would frustrate Price-Anderson's compensatory purposes

because radiation injuries take longer than one year to become manifest. Her arguments are unpersuasive.

Judge Cote's determination that Ms. Corcoran's claims are barred by the statute of limitations is reviewed *de novo*. *See Eagleston v. Guido*, 41 F.3d 865, 870 (2d Cir. 1994).

Price-Anderson contains a three-year statute of limitations for PLAs arising out of an ENO. *See* 42 U.S.C. § 2210(n)(1)(F). Price-Anderson, however, does not provide a statute of limitations governing PLAs, like Ms. Corcoran's, that arise out of less severe accidents. Subject to a limited exception not relevant here, *see North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995), "[w]hen Congress fails to provide a statute of limitations for claims arising under federal statutes, a court must apply the limitations period of the state-law cause of action most analogous to the federal claim." *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 333 (2d Cir. 1997); *see North Star Steel Co.*, 515 U.S. at 33-34. "This requires the court to 'characterize the essence' of [a] plaintiff's federal claim." *Sandberg*, 111 F.3d at 333 (quoting *Wilson v. Garcia*, 471 U.S. 261, 268 (1985)).

Plaintiff's initial argument, that the three-year statute of limitations governing negligence claims is most analogous to her intentional tort claim, is without merit. She alleged in her complaint that Westinghouse "intentionally" exposed her father to harmful quantities of radiation without apprizing him of, or obtaining his consent for, such exposure. This is a textbook battery action under New York law—"an intentional wrongful physical contact with another person without consent." *United Nat'l Ins. Co. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 108 (2d Cir. 1993). Because battery was the most analogous cause of action, Judge Cote did not err when she applied New York's one-year battery statute of limitations.

We also reject Ms. Corcoran's contention that applying New York's one-year statute of limitations here is inconsistent with Price-Anderson because the latency period for radiation injuries exceeds one year. By relying on state law to provide the basis for a Price-Anderson action, Congress understood that each state had associated an individual statute of limitations with a specific cause of action and was aware that these neutral state law rules could bar recovery. *See Lujan*, 69 F.3d at 1518. Moreover, Congress expressly recognized that the state's workers' compensation scheme can provide the exclusive remedy for radiation exposure claims. *See* 42 U.S.C. § 2014(w) (prohibiting federal courts from entertaining actions properly characterized as workers' compensation claims under the guise of Price-Anderson). Because New York's Workers' Compensation Law provides an adequate, alternative remedy, we see no inconsistency in applying the statute of limitations New York has assigned to the intentional tort plaintiff alleged in order to circumvent Workers' Compensation Law. *Cf. Building & Constr. Dep't, AFL-CIO v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492-96 (10th Cir. 1993) (state law workers' compensation action sole recourse for Price-Anderson plaintiff); *George v. GPU Nuclear Corp.*, 910 F. Supp. 180, 185 (M.D. Pa. 1995) (same).

In essence, plaintiff advocates a system under which she would be exempt from the one-year statute of limitations applicable to battery claims, while at the same time remaining free from the restrictions imposed by New York's Workers' Compensation Laws. Had Congress envisioned such a "pick and choose" regime, it could have provided for one. It did not.

2. *Tolling*

Plaintiff next argues that even if New York's one-year statute of limitations applied to the battery claim, Judge Cote erred when she declined to toll the statute of limitations until Ms. Corcoran "actually" discovered her claim on January 17, 1995. Ms. Corcoran asserts that *federal*, not state, tolling rules apply and her battery claim is timely under federal accrual rules. We disagree.

Where the federal statute does not provide a statute of limitations and a federal court "borrows" a state statute of limitations, the court also "borrows" the applicable state law tolling rules unless those rules are inconsistent with, or would frustrate the purposes of, the federal law. *See Leon v. Murphy*, 988 F.2d 303, 310 (2d Cir. 1993); *Jewell v. County of Nassau*, 917 F.2d 738, 740 (2d Cir. 1990). Because the C.P.L.R. provides ample tolling provisions designed to remedy inequity, applying New York's tolling provisions does not frustrate the goals of Price-Anderson. *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

Morever, even if the federal rule of equitable tolling applies, Ms. Corcoran's claim would still be time-barred. Under federal common law, a statute of limitations may be tolled due to the defendant's fraudulent concealment if the plaintiff establishes that: (1) the defendant wrongfully concealed material facts relating to defendant's wrongdoing; (2) the concealment prevented plaintiff's "discovery of the nature of the claim within the limitations period"; and (3) plaintiff exercised due diligence in pursuing the discovery of the claim during the period plaintiff seeks to have tolled. *Lanza v. Merrill Lynch & Co.*, 154 F.3d 56, 60 (2d Cir. 1998); *see Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993).

Mr. Corcoran knew, or should have known, the nature of his claim within the statutory period. He knew in 1985 that he may have been exposed to radiation. NYPA conducted safety meetings, officials spoke to concerned workers, and the area around the stop valve was cordoned off with yellow and magenta tape. In addition, when he was diagnosed with CML in March 1992, at least one of his doctors explained that there was a link between leukemia generally and radiation exposure. During the summer of 1992, he discussed with his ex-wife the possibility of bringing a radiation claim against NYPA and Westinghouse. Finally, he asked Coli to conduct an informal investigation. Under these circumstances, any tolling period would have ended, at the latest, during the summer of 1992 when Mr. Corcoran possessed sufficient information to know the critical facts of his claim. Therefore, the action commenced in 1994 was barred by the applicable one-year statute of limitations.

C. *Federal Accrual Rules*

Plaintiff next argues that the accrual date for her intentional tort claims should be determined under federal, not New York, law. Noting that Price-Anderson is a federal statute, Ms. Corcoran relies on this Court's general rule that *federal* rules of accrual apply even when we "borrow" an analogous state statute of limitations. *See, e.g.*, *Kronisch v. United States*, 150 F.3d 112, 123 (2d Cir. 1998).

Westinghouse acknowledges our general rule. However, Westinghouse claims that we should depart from our general rule when the plaintiff brings a Price-Anderson action because accrual rules are "substantive" and Price-Anderson requires us to derive the elements of a Price-Anderson action from the applicable state's "rules for decision." *See* 42 U.S.C. § 2014(hh). Westinghouse relies on two unpublished Ninth Circuit cases, *Tokerud v. Pacific Gas & Elec. Co.*, Nos.

96-16629, 1998 U.S. App. LEXIS 71265 (9th Cir. Apr. 8, 1998), *Tilley v. Pacific Gas & Elec. Co.*, No. 94-56313, 1996 U.S. App. LEXIS 5548 (9th Cir. Mar. 12, 1996), a Sixth Circuit decision, *Neiman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997), and *dictum* from the Tenth Circuit, *Lujan*, 69 F.3d at 1516.

We need not resolve this interesting academic issue because under either federal or New York law, Ms. Corcoran's "battery" claim is untimely. Under New York law, the "battery" claim accrued in 1985 when her father was exposed to radiation. *See Estate of Wisser*, 626 N.Y.S.2d at 451. Ms. Corcoran's action, commenced in 1995, clearly falls outside the one-year statute of limitations governing this claim. *See* N.Y. C.P.L.R. § 215(3) (McKinney 1990).

Under federal law, an action normally accrues at the time of injury. *See Kronisch*, 150 F.3d at 121. However, "where plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the so-called 'diligence-discovery rule of accrual' applies." *Id.* Under this rule, "accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." *Id.* Discovery of the "critical facts" of injury and causation

> requires only knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. . . . [A] plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of

injury and causation to protect himself by seeking legal advice.

Id. (quotation omitted).

By March 20, 1992, Mr. Corcoran had learned from his doctors that his leukemia could have been caused by radiation. Because Mr. Corcoran knew that his leukemia may have been caused by radiation exposure at IP3, his Price-Anderson claims accrued on that date. *See, e.g., id.*; *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995). Thus, the one-year limitations period expired well before Ms. Corcoran commenced this action in 1995.

D. *Fraud claim*

Ms. Corcoran claims that Judge Cote erred by applying New York's one-year limitations period governing *battery* claims to bar the *fraud* claim. She challenges Judge Cote's finding that the fraud claim was merely "incidental" to the battery claim and New York's shorter limitations period therefore governed both the battery and fraud claims. We reject this argument.

"In applying a Statute of Limitations it is basic that one look to the essence of plaintiff's claim and not to the form in which it is pleaded." *State v. Cortelle Corp.*, 378 N.Y.S.2d 654, 656 (N.Y. 1975); *see Brick v. Cohn-Hall-Marx Co.*, 276 N.Y. 259, 264 (N.Y. 1937). When a fraud claim is incidental to another asserted claim, the claim does not sound in fraud for purposes of taking advantage of the longer limitations period. *See id.*; *Doe v. Roe*, 596 N.Y.S.2d 620, 620-21 (4th Dep't 1993). A fraud action is not incidental only when: (1) the fraud occurred separately from and subsequent to the injury forming the basis of the alternate claim; and (2) the injuries caused by the fraud are distinct from the injuries

caused by the alternate claim. *See Harkin v. Culleton*, 554 N.Y.S.2d 478, 481-82 (1st Dep't 1990).

Plaintiff may meet the first requirement because Westinghouse's allegedly false statements designed to conceal the radiation leak seem to be separate and distinct from the exposure. However, Ms. Corcoran does not satisfy the second requirement. She asserts two separate injuries: (1) her father was denied early care and medical monitoring that could have mitigated the effects of his disease; and (2) she and her father were prevented from asserting claims against Westinghouse and NYPA.

The exacerbation of her father's injuries due to the alleged fraud does not constitute a *separate* injury that resulted from the alleged fraud. Rather, it is merely an exacerbation of the original injury. *See, e.g., New York Seven-Up Bottling Co. v. Dow Chem. Co.*, 466 N.Y.S.2d 478, 480 (2d Dep't 1983), *aff'd*, 473 N.Y.S.2d 973 (1984); *Spinosa v. Weinstein*, 571 N.Y.S.2d 747, 753 (2d Dep't 1991); *Harkin*, 554 N.Y.S.2d at 481-82. Similarly, her inability to commence a timely action does not satisfy the independent injury requirement. *See General Stencils, Inc. v. Chiappa*, 272 N.Y.S.2d 337, 340 (N.Y. 1966).

IV. *Leave to Amend the Complaint*

Plaintiff's final point is that Judge Cote erred when she denied the request to amend the pleading to assert new claims against NYPA and Westinghouse. Prior to the denial of leave to amend, Ms. Corcoran commenced a separate action asserting these same claims. This parallel action was dismissed on the merits on March 30, 1999 (after this appeal was filed). *See Corcoran IV*, No. 97 Civ. 9286 (DLC), 1999 WL 177444 (S.D.N.Y. Mar. 30, 1999). Therefore, her challenge to Judge Cote's denial of leave to amend is moot. *See Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997).

CONCLUSION

We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

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UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the united States Courthouse, Foley Square, in the City of New York, on the 7th day of December, one thousand nine hundred and niney-nine.

CORCORAN

Plaintiff-Appellant

Dkt No: 98-7945

v.

NY Power Authority,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Corcoran.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk
By:_____
Beth J. Meador, Administrative Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARRIE CORCORAN, as Executrix of the Estate of Eugene Corcoran, deceased, and CARRIE CORCORAN, individually,

Plaintiffs,

-against-

LEROY W. SINCLAIR; J.P. BAYNE; JOHN V. BRONS; WILLIAM JOSIGER; J. RUSSEL; DENNIS QUINN; JOSEPH PERROTTA; HUGH GILMARTIN; IAN MEW; ROBERT DESCHAMPS; PAUL SAUNDERS; JOHN NEFF; MARYANN CHAUBARD; THOMAS MICHAEL PHILLLIPS; RICK MOULD; CHARLES FLORIN; STEVE TENCZA

and

DOEs 1 through 25, inclusive,

Defendants.

97 Civ. 9286
(DLC) (THK)
Pro Se

REPORT AND
RECOMMENDATION

THEODORE H. KATZ, UNITED STATES MAGISTRATE JUDGE. TO: THE HON. DENISE L. COTE, UNITED STATES DISTRICT JUDGE:

This case was referred to me for all pretrial purposes and the resolution of dispositive motions by Order of Reference, dated February 3, 1998. Carrie Corcoran, on her own behalf, and as Executrix of Eugene Corcoran's estate ("plaintiffs"), proceeding pro se, brought this action under 42 U.S.C. §§

1983, 1985, and 1986. Ms. Corcoran alleges that defendants, employees of the New York Power Authority ("NYPA") and Westinghouse electric Corporation ("Westinghouse"), recklessly exposed her father, Eugene Corcoran, to radioactive contamination while he was employed at a nuclear power plant, and then conspired to conceal the facts surrounding his exposure in an effort to hinder his ability to bring claims based on his radiation injuries. This action was filed shortly after the dismissal of two earlier lawsuits arising out of the same set of facts, brought by plaintiffs against NYPA and Westinghouse, the employers of the defendants in the instant action.

Defendants have moved to dismiss plaintiffs' Complaint and/or for summary judgment, pursuant Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, respectively. Defendants have also moved for attorneys' fees, costs, and sanctions pursuant to Rule 11, Fed. R. Civ. P., and for an order enjoining plaintiffs from commencing further litigation against defendants and related parties, pursuant to the All Writs Act, 28 U.S.C. § 1651. Plaintiffs have cross-moved for leave to amend their Complaint, pursuant to Fed. R. Civ. P. 15(a). For the reasons that follow, I respectfully recommend that defendants' motion to dismiss and/or for summary judgment be granted, and that this action be dismissed with prejudice. Additionally, I recommend that plaintiffs' cross motion to amend their Complaint, and defendants' motions for sanctions and injunctive relief be denied.

BACKGROUND

The facts as alleged in the Complaint are assumed to be true for the purposes of defendants' Rule 12(b)(6) motion. As plaintiffs' Complaint is sixty-two pages in length, comprising 336 paragraphs, the facts pertinent to deciding defendants' motion are summarized below.

Eugene Corcoran's Injury

In 1985, plaintiffs' decedent, Eugene Corcoran, was employed by the Westinghouse Electric Corporation ("Westinghouse") as a millwright. Complaint, ¶ 43. A millwright disassembles and repairs machinery. Id. at ¶ 9. Between June and August 1985, Mr. Corcoran was assigned by Westinghouse to do maintenance work at Indian Point No. 3 Nuclear Power Plant ("IP3"), a federally licensed nuclear power plant located in Buchanan, New York. Id. at ¶¶ 13, 44. The New York Power Authority ("NYPA") was at that time, and continues to be, the holder of the facility's operating license. Id. Mr. Corcoran was assigned to work in IP3's turbine building, where he performed maintenance work on the steam turbine and associated steam intake system serving the plant. Id. at ¶ 44. One of the areas within the turbine building where Mr. Corcoran worked was known as the "#32 stop valve." Id. at ¶ 54. Plaintiffs allege that in 1985, radioactive contamination was present in this area, due to a rupture in the steam generator tubes which carried radioactive water and other radioactive material. Id. at ¶¶ 42, 56. Although defendants, employees of both Westinghouse and NYPA, were aware that the steam generator tubes were defective and created a dangerous potential for radioactive contamination, they failed to provide Mr. Corcoran with protective clothing, or with "personnel monitoring equipment," designed to alert him to the presence of radiation. Id. at ¶¶ 47-53.[1] In addition, defendants failed to survey the area around the stop valve for possible contamination before they assigned Mr. Corcoran to work at that location. Id. at ¶ 66.[2]

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[1] Plaintiffs claim that in failing to provide Mr. Corcoran with such items, they "knowingly and intentionally violated" federal regulations, which were in effect at the time of the events in question. Id. at ¶ 51; see also ¶¶ 261-263 (citing 10 C.F.R. §§ 20.202 and 20.101 (1985)).

Plaintiffs allege that by the time the first documented survey of the #32 stop valve -- which detected radiation -- was performed on June 25, 1985, Mr. Corcoran already had worked at the stop valve for at least three shifts, including the June 18, 20, and 21 night shifts. Id. at ¶ 68. While a barricade was erected around the contaminated area following the June 25 survey, it was not erected until 1:00 P.M. on the following day. Therefore, Mr. Corcoran, who worked the night shift on June 25, was not provided with any warning of the dangerous condition. Id. at ¶¶ 86-90. As a result, Mr. Corcoran was exposed to radiation "well in excess of the permissible occupational dose limits for workers in restricted areas of nuclear power plants as stated in the federal regulations at 10 C.F.R. § 20.101." Id. at ¶ 246.

Plaintiffs contend that once defendants became aware of the contaminated state of the stop valve, they were required under federal law to advise Mr. Corcoran that he had been exposed to radiation, to provide him with written notification of the actual or estimated radiation dose that he sustained, and to administer tests, such as "whole body counts" or other "bioassay testing services," for the purpose of determining the extent of his exposure to radiation. Id. at ¶¶ 81-84, 129-132 (citing 10 C.F.R. § 408 (1985)); 267-282 (citing various federal regulations). However, defendants failed to provide Mr. Corcoran with such information or testing. Id. at ¶¶ 81-85. Furthermore, defendants failed to document and maintain records of surveys conducted at the stop valve subsequent to the June 25 survey, as required under federal regulations. Id. at ¶¶ 238-240 (citing 10 C.F.R. § 20.401(b)(1985)).

Following his exposure to the contaminated stop valve, Mr. Corcoran fell ill "in or around June 1985," suffering from

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[2] Plaintiffs submit that defendants were required under federal regulations to perform work area surveys prior to the commencement of work. See Complaint at ¶ 62; see also ¶ 210 (quoting 10 C.F.R. § 20.201 (1985)).

"acute radiation sickness." Id. at ¶ 184. At the time, however, his symptoms were not diagnosed as resulting from radiation exposure, and Mr. Corcoran was unaware that his illness was associated with radiation. Id. For several years following his exposure to radiation at IP3, Mr. Corcoran "continued to suffer from debilitating illnesses of unexplained etiology and was hospitalized." Id. at ¶ 185; see also ¶ 186. On March 16, 1992, Mr. Corcoran was admitted to Mid Island Hospital in Bethpage, New York, and was diagnosed with chronic myeloid leukemia ("CML"), "a fatal disease of the body's blood and immune systems, which is brought on by excessive exposure to nuclear radiation." Id. at ¶¶ 187, 151.

Sometime in 1992, Stephen Coli, a fellow millwright and employee of Westinghouse who had worked with Mr. Corcoran at IP3 in 1985, heard that he was suffering from leukemia. Coli offered to help Mr. Corcoran investigate whether or not his employment at IP3 was related to his illness. Id. at ¶ 121. Defendant Hugh Gilmartin, an NYPA coordinator who had worked at IP3 in 1985, was still working at the plant in 1992 when Coli commenced his investigation. Id. at ¶ 122. When Gilmartin heard about Mr. Corcoran's illness and Coli's inquiries regarding the 1985 incident, he warned Coli not to "drag things up." Id. at ¶ 123. Fearing that further inquiries might jeopardize his employment with Westinghouse, Coli reported back to Mr. Corcoran that his inquiries had led to a "dead end," and discouraged Mr. Corcoran from pursuing a claim for radiation injury. Id. at ¶¶ 124-126.

Mr. Corcoran died on September 25, 1993. Id. at ¶ 188. In January, 1994, Carrie Corcoran's family contacted several attorneys to investigate the possibility that Mr. Corcoran's leukemia was caused by his exposure to radiation at IP3 in 1985. Id. at ¶ 167. Around that time, two attorneys undertook an investigation into the cause of Mr. Corcoran's

injuries and death. Id.[3] As part of this investigation, a notice was posted in the union hall of the Millwright and Machinery Local Union 740 in January 1994, asking for information from anyone who knew about radiation problems at IP3 in 1985. Id., at ¶¶ 172, 170. On January 17, 1995, Stephen Coli called in response to the notice. Id. at ¶ 172. "Based on information learned from Coli on January 17, 1995, and on further investigation conducted subsequent thereto," plaintiffs filed separate actions against NYPA and Westinghouse. Id. at ¶¶ 174-175. Because each of defendants' motions in the instant action is based in large part on arguments concerning plaintiffs' prior, related lawsuits against NYPA and Westinghouse, the substance and outcome of those suits are discussed below.

Prior Litigation

On March 15, 1995, Carrie Corcoran, on her own behalf and as Executrix of Eugene Corcoran's estate ("plaintiffs"), filed a lawsuit against NYPA and WEDCO Corporation ("WEDCO") in New York Supreme Court ("the NYPA action"), alleging that Eugene Corcoran had died as a result of exposure to radioactive contamination while working as a millwright at the IP3 plant. Following a timely removal by the defendants to federal court, plaintiffs filed an Amended Complaint against NYPA and WEDCO, and filed a new and separate action against Westinghouse on September 21, 1995 ("the Westinghouse action"). On November 7, 1995, the Honorable Denise L. Cote, United States District Judge, entered an Order consolidating both actions. On December 1, 1995, NYPA, WEDCO and Westinghouse moved to dismiss the Amended Complaint in the NYPA action and the Complaint in the Westinghouse action, pursuant to Rule 12(b)(4), (5), and (6) of the Federal Rules of Civil Procedure. Plaintiffs then filed an Amended Complaint in the Westinghouse action on December 27, 1995, and on January

[3] The attorneys later resigned from the matter because they were unable to uncover any basis for plaintiffs' claims. Id. at ¶ 171.

17, 1996, filed a Second Amended Complaint in the NYPA action. See Corcoran v. New York Power Auth., 935 F.Supp. 376, 381-382 (S.D.N.Y. 1996) ("Corcoran I"). Plaintiffs alleged that NYPA and Westinghouse were liable for Eugene Corcoran's death from exposure to radiation at IP3 on the basis of a host of state law claims, as well as violations of the federal regulations. See 935 F.Supp. at 386-392.

The Court granted in part and denied in part NYPA's and Westinghouse's motion to dismiss the plaintiffs' claims in the amended pleadings filed in both actions.[4] In her decision, Judge Cote held that because plaintiffs' claims arose out of a nuclear incident, plaintiffs' exclusive right of action was a "public liability action" ("PLA"), pursuant to 42 U.S.C. § 2210(n)(2) of the Price-Anderson Amendments Act of 1988, and thus permitted plaintiffs to pursue their state law claims only as a PLA. Id. at 383-386. Furthermore, because, as the Court noted, "the rules of decision for a PLA must be derived from state, not federal, law," id. at 388 (citing 42 U.S.C. § 2014(hh)), the court dismissed plaintiffs' claims that defendants had willfully violated various federal statutes and regulations. See id. at 388-390. The parties then engaged in extensive pretrial discovery for approximately one year, on issues related to the timeliness of plaintiffs' claims.

On September 26, 1997, Judge Cote granted summary judgment for the defendants on the claims that had survived the issuance of Corcoran I. See Corcoran v. New York Power Auth., No. 95 Civ. 5357 (DLC), 95 Civ. 8102 (DLC) 1997 WL 603739 (S.D.N.Y. Sept. 29, 1997) ("Corcoran II"). After separately analyzing the accrual dates for each of

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[4] The Court also dismissed WEDCO from the case since (1) the plaintiffs alleged no claims against WEDCO in the Second Amended Complaint, (2) plaintiffs had no theory of liability with respect to WEDCO, and (3) WEDCO lacked the capacity to be sued since the corporation had been dissolved on May 2, 1978. See 935 F.Supp. at 391.

plaintiffs' causes of action, the Court dismissed plaintiffs' negligence, battery, fraud, wrongful death, and survival claims against NYPA because plaintiffs had failed to file a timely notice of claim with respect to each cause of action, as required by New York General Municipal Law §50-e. Id. at **3-7. In addition, the Court rejected plaintiffs' argument that, under the doctrine of equitable estoppel, NYPA should have been precluded from relying on a statute of limitations defense. Id. at **7-8.

Judge Cote also dismissed plaintiff' claims against Westinghouse, holding that the New York Workers' Compensation Law provided the exclusive remedy for Mr. Corcoran's injuries, as he was an employee of Westinghouse. Id. at *8. While the Court acknowledged that the New York Workers' Compensation Law would not prevent suit for intentional torts, such as battery or fraud, it found that plaintiffs had failed to produce evidence of any actions by Westinghouse which demonstrated a willful intent to harm Mr. Corcoran. Id. In any event, the Court held, plaintiffs' claims of battery and fraud would be time-barred under the applicable statutes of limitations, even if they were not precluded by the exclusivity provision in the Workers' Compensation Law. Id.

On October 7, 1997, plaintiffs filed a motion for reconsideration and notice of appeal. Plaintiffs argued that Judge Cote had overlooked a portion of their argument when she rejected their equitable estoppel defense to the application of the statute of limitations. They also claimed that the Court overlooked evidence and arguments which demonstrated that Westinghouse was liable for the intentional torts of battery and fraud. See Corcoran v. New York Power Auth., No. 95 Civ. 5357(DLC), 95 Civ. 8102 (DLC), 1998 WL 274290, *3-4 (S.D.N.Y. May 27, 1998). In addition, the plaintiffs sought to reopen discovery regarding their claims for prima facie tort and violation of Mr. Corcoran's civil rights under 42 U.S.C. §§ 1983, 1985, and 1986. Id. at *4. Judge Cote granted the motion for

reconsideration with regard to plaintiffs' discovery argument only, and then reaffirmed the dismissal of Corcoran II, holding that further discovery would not assist the plaintiffs because any additional causes of action against Westinghouse would be time-barred. Id. The Court also held that "[i]t [was] simply too late for the plaintiffs to amend their complaints" to add new civil rights and prima facie tort claims. Id.

On December 17, 1997, while Judge Cote's decision on plaintiffs' motion for reconsideration of Corcoran II was pending, plaintiffs filed the instant action against defendants Leroy W. Sinclair, J.P. Bayne, John C. Brons, William Josiger, J. Russell, Dennis Quinn, Joseph Perrotta, Hugh Gilmartin, Ian Mew, Robert Deschamps, Paul Saunders, John Neff, Maryann Chaubard, and Thomas Michael Phillips, officers and employees of NYPA ("the NYPA Defendants"), and against Rick Mould, Charles Florin, and Steve Tencza, employees of Westinghouse ("the Westinghouse Defendants").[5] Plaintiffs' claims in the instant action mirror the basic allegations asserted in plaintiffs' prior lawsuits against NYPA and Westinghouse -- that Mr. Corcoran died as a result of excessive exposure to radioactive contamination while working as a millwrights at the IP3 plant in 1985, and that the defendants improperly concealed his exposure and failed to abide by applicable regulations. This time, however, plaintiffs seek relief under 42 U.S.C. §§

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[5] Plaintiffs state in the Complaint that "the individual Defendants, were the agents, servants, and employees of NYPA, and/or Westinghouse, and were at all times mentioned herein, acting within the scope, course, and authority of their employment.: Complaint at ¶ 37; see also ¶¶ 14-34 (describing defendants' positions and duties).

1983,[6] 1985,[7] and 1986,[8] claiming that defendants' conduct in connection with the 1985 incident violated both Eugene and Carrie Corcoran's civil rights.

Plaintiffs' legal claims against the defendants are extremely difficult to decipher, because they are cast in often incoherent, amorphous legal language, are sprinkled

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[6] 42 U.S.C. § 1983 provides, in pertinent part:

> every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[7] 42 U.S.C. § 1985 provides, in pertinent part:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws. . . .
>
> (3) [T]he party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[8] 42 U.S.C. § 1986 provides in pertinent part:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act. . . .

throughout the Complaint, and are often repeated verbatim in different sections, although under different headings. Construing the Complaint liberally, however, and with the assistance of plaintiffs' further explanations in their motion papers, the Court has interpreted plaintiffs' claims as follows.

Plaintiffs' Claims For Relief Under 42 U.S.C. § 1983

1) Plaintiffs allege that defendants, "under color of state law, recklessly exposed Eugene Corcoran to radiation above the permissible occupational dose limits established by the federal regulations," depriving him of his constitutionally protected rights to life and liberty. See id. at ¶ 2, 246; see also Plaintiffs' Memorandum of Law in Support of their Cross Motion to Amend the Complaint an in Opposition to Defendants' Motion to Dismiss the Complaint and/or for Summary Judgment ("Plaintiffs' Mem. in Opposition") at 12.

2) Plaintiffs allege that defendants, under color of state law, deprived Mr. Corcoran of his rights under various federal regulations enacted for the safety and protection of nuclear plant workers. Specifically, plaintiffs claim that Mr. Corcoran was deprived of his right to personnel monitoring and written notification of his radiation dose. Complaint at ¶¶ 2, 278-279; Plaintiffs' Mem. in Opposition at 5-6 (citing 10 C.F.R. §§ 20.202, 20.405, 20.408, 20.108, 20.401 (1985)). Plaintiffs also allege that defendants engaged in "class-based discrimination" against the millwrights, denying Mr. Corcoran "the equal protection of the federal regulations as enjoyed by the permanent employees of NYPA, and management personnel of Westinghouse. . . ." Complaint at ¶ 309.

3) Plaintiffs allege that defendants violated their constitutional right of meaningful access to the courts. Complaint at ¶¶ 241, 284, 306; Plaintiffs' Mem. in Opposition at 22-28. Specifically, plaintiffs allege that defendants interfered with their access to the courts by failing to document and maintain surveys, Complaint at ¶ 241, and by

depriving Mr. Corcoran of his "federal right to know his radiation dose." Id. at ¶ 279. Plaintiffs contend that defendants' wrongful conduct deprived them of evidence needed to bring successful claims against NYPA and Westinghouse for Mr. Corcoran's injuries. Id. at ¶ 282.

Plaintiffs' Claims For Relief Under 42 U.S.C. § 1985

4) Plaintiffs allege that the defendants "conspired together and maliciously and willfully entered into a scheme to conceal the facts surrounding the contamination of the valve, and the fact that . . . [Mr. Corcoran] . . .[was] most likely exposed to radiation in excess of the permissible occupational dose limits stated in the federal regulations." Id. at ¶ 291. Plaintiffs claims that defendants' failure to document and maintain survey records, their failure to notify Mr. Corcoran of his exposure, and their failure to provide Mr. Corcoran with information regarding his radiation dose were deliberate acts committed in furtherance of this conspiracy, the purpose of which was "to hinder plaintiffs' ability to bring claims for injuries" to Mr. Corcorcan. Id. at ¶ 292; see ¶¶ 293-295. Plaintiffs contend that as a result of defendants' conduct, both Eugene and Carrie Corcoran were "denied justice as [they] . . . fruitlessly sought to uncover the acts so that [they] might discover the cause of [Mr. Corcoran's] illness and pursue his legal remedies for the injuries he sustained." Id. at ¶¶ 297-298.

5) Plaintiffs also allege that, in furtherance of the defendants' conspiracy, defendant Hugh Gilmartin threatened and intimidated Mr. Coli to prevent him from testifying for the plaintiffs.[9] Plaintiffs assert that Mr. Gilmartin's warning caused Mr. Coli to withhold "very valuable information" from plaintiffs until January 17, 1995, at which point it was too late to file a timely notice of claim in Corcoran II. Therefore, plaintiffs argue, Mr. Gilmartin's

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[9] Plaintiffs contend that this allegation specifically states a §1985(2) claim for "witness intimidation." See Plaintiffs' Mem. in Opposition at 30-33.

wrongful conduct caused plaintiffs to lose their remedy under the Price-Anderson Act in Corcoran II. See Plaintiffs' Mem. in Opposition at 33; see also Plaintiffs' Memorandum of Law in Further Support of Plaintiffs' Cross Motion to Amend the Complaint ("Plaintiffs' Mem. in Further Opposition.") at 12-13.

Plaintiffs' Claims For Relief Under 42 U.S.C. § 1986

6) Plaintiffs allege that '[a]ll of the Defendants . . . had knowledge of the aforementioned wrongs conspired to be done, and participated, implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct. Although each of the Defendants had the power to aid in preventing the commission of the wrongful acts, he or she neglected to do so." Id. at ¶150.

* * *

Defendants have moved to dismiss the Complaint and/or for summary judgment on the following grounds: (1) plaintiffs are barred by the doctrine of res judicata from relitigating claims that could have been asserted in the prior litigation; (2) if plaintiffs' civil rights claims are construed as a PLA, they must be dismissed under the doctrine of collateral estoppel; (4) plaintiffs have failed to state a claim for the alleged violations of constitutional rights under 42 U.S.C. §§ 1983, 1985, and 1986; (5) all of plaintiffs' civil rights claims are untimely; (6) defendants are all entitled to qualified immunity; (7) plaintiff Carrie Corcoran cannot proceed pr se as executrix of Eugene Corcoran's estate. See Defendants' Memorandum of Law in Support of their Motion to Dismiss Plaintiffs' Complaint and/or for Summary Judgment ("Defendants' Mem."), passim.

DISCUSSION

I. Dismissal under Rule 12(b)(6)

On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all allegations of the complaint as true, draw all reasonable inferences in plaintiffs' favor and may dismiss only if "it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Walker v. City of New York, 974 F.2d 293, 298 (2d Cir. 1992), cert denied, 507 U.S. 961 (1993); Fields v. Soloff, 920 F.2d 1114, 1118-19 (2d Cir. 1990); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986). All pleading should be construed so as to do substantial justice. Fed. R. Civ. P. 8(f). In deciding motions to dismiss brought pursuant to Rule 12(b)(6), the court "is not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Festa v. Local 3 Int'l Bhd. of Elec. Workers, 905 F.2d 35, 37 (2d Cir. 1990). Moreover, pro se complaints such as the instant one, should be liberally construed by the Court. Estelle v. Gamble, 429 U.S. 97, 106 (1976). They are to be afforded a close and sympathetic reading and are not to be held to as rigorous a standard as formal pleadings prepared by an attorney. Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam); Washington, 782 F.2d at 1138; Salahuddin v. Coughlin, 781 F.2d 24, 28-29 (2d Cir. 1986).

Even construing the Complaint liberally, this Court seriously doubts that plaintiffs have alleged facts sufficient to state cause of action under 42 U.S.C. §§ 1983, 1985, and 1986. For example, plaintiffs' allegations of conspiracy are wholly conclusory, with virtually no facts alleged suggesting either direct or indirect involvement by the defendants in a collective scheme to violate Mr. Corcoran's rights. However, in the interest of judicial economy, the Court need not and will not address whether plaintiffs' claims of civil rights violations are viable. Instead, the Court finds that (1) the Price-Anderson Amendments Act of 1988 ("the Amendments Act") precludes plaintiffs from bringing a civil rights action based on the facts alleged; and (2) even if plaintiffs' civil rights claims were not foreclosed by the Amendments Act, they would be time-barred.

II. Plaintiffs' Exclusive Remedy is a PLA under the Price-Anderson Amendments Act of 1988

A. The Act

In order to explain this Court's conclusion that plaintiffs' civil rights claims are foreclosed by the Amendments Act, an examination of the Act in the context of the overall federal statutory scheme regulation nuclear power is useful. In 1946, Congress enacted the Atomic Energy Act, which initially gave the federal government a monopoly with respect to the development of nuclear power. Congress later determined, however, that the national interest would best be served by including the private sector in the development of atomic energy. See O'Conner v. Comnonwealth Edison Co., 13 F.3d 1190, 1095 (7th Cir. 1994). Therefore, Congress enacted the Atomic Energy Act of 1954, 68 Stat. 919 (the "AEA"), eliminating complete federal control over the nuclear industry, and creating instead a system of government regulation, including inter alia, federal safety standards and licensing requirements. See Corcoran I, 935 F.Supp. at 383, (citing In Re TMI, 67 F.3d 1103, 1107 (3d Cir. 1995) ("TMI")). To carry out this objective, Congress established the Atomic Energy Commission, and gave it authority to license and regulate nuclear facilities. See 42 U.S.C. §§ 2011-2281.

Congress granted the Atomic Energy Commission (now the Nuclear Regulatory Commission) "exclusive jurisdiction to regulate the safety aspects of nuclear power plants." County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 57 (2d Cir. 1984); see Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 212 (1983) ("[T]he federal government maintains complete control of the safety and 'nuclear' aspects of energy generation. . . ."). With regard to enforcement of the AEA or of the regulations promulgated thereunder, Congress provided:

> No action shall be brought against any [person or entity] for any violation under this chapter unless and until the Attorney General of the United States had advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General of the United States. . . .

42 U.S.C. § 2271(c); see also 42 U.S.C. § 2014(s).[10] This general enforcement provision of the AEA "expressly precludes private judicial enforcement of the Act. . . ." Long Island Lighting Co., 728 F.2d at 59 (affirming dismissal of complaint against power company "insofar as it seeks to enforce NRC promulgated regulation"); see also Liesen v. Louisiana Power & Light Co., 636 F.2d 94, 95 (5th Cir. 1981) (private litigant cannot enjoin construction of nuclear power plant claiming violations of AEA standards and regulations); Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 237-39 (3d Cir. 1980), cert denied, 449 U.S. 1096 (1981) (private litigants cannot enjoin nuclear plant operators based upon allegations of a plan to release radioactive water into the Susquehanna River). Private parties may, however, participate in the administrative process.[11]

Despite the AEA's comprehensive system of federal licensing requirements and regulatory standards, as well the protection it offered operators of nuclear power plants from suit by private individuals for failure to comply with its provisions, the private sector was reluctant to enter the

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[10] Once the Attorney General has advised the NRC, the Attorney General may enforce the provisions of the Act or the NRC regulations through criminal prosecutions, see 42 U.S.C. §§ 2272-2278b; injunctive actions, see 42 U.S.C. § 2280; and through actions seeking civil penalties. See 42 U.S.C. § 2282(c).

[11] See 10 C.F.R. §2.714 (interested parties may intervene in agency proceedings); 42 U.S.C. § 2239(a) (requiring the NRC to grant a hearing upon the request of interested parties).

industry due to "the danger of staggering liabilities associated with nuclear power accidents." Corcoran I, 935 F.Supp., at 384. Thus, in 1957, Congress enacted the Price-Anderson Act, 71 Stat. 576, which provided federal funds to help pay for damages caused by nuclear accidents, and limited the potential civil liability of nuclear plant operators. Corcoran I, 935 F.Supp. at 384 (citing TMI III, 67 F.3d at 1107). "The Act, therefore, 'had a dual purpose: to protect the public and to encourage the development of the atomic energy industry.'" Corcoran I, 935 F.Supp. at 384 (quoting Lujan v. Regents of University of California, 69 F.3d 1511, 1414 (10th Cir. 1995) (citing 71 Stat. at 576, codified at 42 U.S.C. § 2012(i)) (internal quotation marks omitted). The Price-Anderson Act had three main features:

> 1) It "established a limit on the aggregate liability of those who wished to undertake activities involving the handling or use of radioactive materials"; 2) It channeled public liability resulting from nuclear incidents to the federal government; and 3) It established that all public liability claims above the amount of required private insurance "protection would be indemnified by the Federal Government, up to the aggregate limit on liability."

O'Conner, 13 F.3d at 1095 (quoting S.Rep. No. 218, 100 Cong., 1st Sess. 2 (1987) reprinted in 1988 U.S,C,C,A,N, 1424, 1476, 1477)) (quoted in Corcoran I, 935 F.Supp. at 384).

The Price-Anderson Act has been amended three times. The 1966 Amendments, inter alia, provided for the transfer to federal district courts of all claims arising out of an "extraordinary nuclear occurrence" ("ENO").[12] See

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[12] An ENO is defined as an event in which nuclear-related materials are discharged offsite (or cause offsite radiation) and which the NRC or the Secretary of Energy "determines to be substantial" and "has resulted or will probably result in substantial damages to persons offsite or property offsite." 42 U.S.C. § 2014(j).

Corcoran I, 935 F.Supp. at 384 (citing O'Conner, 13 F.3d at 1095). "Concerned with the unsettled state of state tort law dealing with liability for nuclear incidents, and motivated by a desire to create greater uniformity, the 1966 Amendments also provided that those indemnified under the Act waive common law defenses in the event of an ENO, which essentially created a 'strict liability' system for such disastrous events." Corcoran I, 935 F.Supp. at 384; see also O'Conner, 13 F.3d at 1095. The Price-Anderson Act was amended a second time in 1975, and again in 1988 by the Amendments Act. The decision to amend the Price-Anderson Act in 1988 arose from congressional recognition that

> [t]he Price Anderson System, including the waiver of defenses provisions the omnibus coverage, and the predetermined sources of funding, provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures an standards of recovery that might otherwise be applicable under State tort law. The act also provides a mechanism whereby the federal government can continue to encourage private sector participation in the beneficial uses of nuclear materials.

O'Conner, 13 F.3d at 1095 (quoting S.Rep. No. 218 at 4). Congress therefore extended federal district court jurisdiction beyond ENOs to include all "nuclear incidents."[13] The 1988 Amendments Act also provided for the removal of state court actions (including those pending in state court at the time of the passage of the Amendments

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[13] "Nuclear incident" is defined, in relevant part, as any occurrence [including an ENO] within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. 42 U.S.C. §2014(q).

Act), and allowed their consolidation into a single, federal court proceeding. See 42 U.S.C. §2210(n)(3); §2210(n)(3). In addition, Congress created a new federal cause of action -- the public liability action ("PLA"). Defined as "any suit asserting public liability," 42 U.S.C. §2014(hh), a PLA encompasses (with exceptions not relevant to the instant action) "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. §2014(w) (defining "public liability"). Given the breadth of this definition,

> the consequence of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price-Anderson Act is that he has no such claim at all. After the [1988] Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*. . . . [T]here can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the [PLA].

In Re TMI Litigation Cases Consol. II, 940 F.2d 832, 854-55 (3d Cir. 1991) ("TMI II") (quoted in Corcoran I, 935 F.Supp. at 385 (emphasis in original)). See also O'Conner, 13 F.3d at 1099 ("the broad definition of 'public liability action' embodied in the Price-Anderson Act implies that Congress has exercised power under Article I and has enacted a new and independent, indeed exclusive cause of action") (footnote omitted); Bohrmann v. Maine Yankee Atomic Power Co., 926 F. Supp. 211, 217 (D. Maine 1996) ("a public liability action pursuant to section 2014(hh) is the sole cause of action for a plaintiff seeking damages for exposure to radiation from a federally licensed nuclear facility").

Although a PLA "became the sole means by which a plaintiff could recover for damages sustained in a nuclear incident," Corcoran I, 935 F.Supp. at 385, Congress expressly stated that the source for the substantive law underlying a PLA would be state law:

> A public liability action shall be deemed to be an action arising under section 2210 of the title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. §2014(hh). Through this provision, "Congress expressed its intention that state law provides the content of and operates as federal law. . . ." TMI II, 940 F.2d at 855. However, Congress also set forth various federal requirement to a PLA including a limitations period, see 42 U.S.C. §2210(n)(1), venue, see 42 U.S.C. §2210(n)(2), choice of law, see 42 U.S.C.§2014(hh), an upper limit of aggregate liability, and limits on the availability of punitive damages, see 42 U.S.C. §§2210(e) and (s). In summary, as the Seventh Circuit has noted, the 1998 Amendments Act

> is the latest installment in nearly fifty years of congressional work. During that time, Congress has attempted to encourage the development of domestic nuclear power to the fullest extent through licensing, indemnification, limitation of liability, and consolidation of litigation. Nevertheless, Congress has balanced this encouragement of private sector activity with an acute concern for public safety by authorizing extensive regulation . . . and by imposing a carefully constructed measure of liability should nuclear incidents occur.

O'Conner, 13 F.3d at 1096-97.

B. Plaintiffs' Claims

In Corcoran I, plaintiffs brought state law claims based on negligence, intentional torts, and conspiracy to defraud alleging inter alia, that NYPA and Westinghouse had caused Mr. Corcoran to be exposed to "dangerous" levels of radiation "in excess of the regulations," 935 F.Supp. at 387, had "deliberately concealed and intentionally failed to notify [the deceased] of his excessive exposure to radiation. . . ," id., and had "conspired together and maliciously and willfully entered into a scheme to conceal this fact from the decease" for the purpose of "defrauding and deceiving . . . the plaintiff." Id. at 389. The Court held, and the plaintiffs did not dispute, that these claims fell "squarely within the definition of a PLA." Id. at 385.

In the instant action, plaintiffs allege that defendants exposed Eugene Corcoran to radiation in excess of the occupational dose limits set by the applicable federal regulations, and then conspired to conceal their wrongdoing in a number of ways. As plaintiffs' allegations of wrongdoing in the instant action are virtually identical to those asserted in Corcoran I, albeit against individual employees of NYPA and Westinghouse rather than the entities themselves, it appears that plaintiffs' claims in this action, too, would fall within the ambit of a PLA since, as in Corcoran I, plaintiff' current claims arise out of or result from a nuclear incident. See 42 U.S.C. 2014(w).

Because, however, plaintiffs' allegations in this action have been recycled as federal civil rights claims as opposed to state law claims, they cannot be brought as a PLA, because the rules of decision for a PLA must be derived from state law. See 42 U.S.C. §2014(hh).[14] Indeed, in Corcoran I,

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[14] It is for this reason that the Court has not relied upon defendants' argument that plaintiffs' civil rights claims are barred under the doctrine of res judicata because they could have brought

the Court dismissed plaintiffs' "statutory liability" claims, which alleged that NYPA and Westinghouse had violated various federal statutes and regulations, holding that "[n]o PLA can be based on these statute and regulations . . . because the rules of decision for a PLA must be derived from state, not federal, law." 935 F.Supp. at 388 (citing §2014(hh)). Therefore, because plaintiffs' federal civil rights claims cannot be brought as a PLA, and because courts have repeatedly held that a PLA is the sole means by which a plaintiffs can recover for damages sustained in a nuclear incident, this Court concludes that plaintiffs' civil rights claims are foreclosed by the Amendments Act.

Congress has the power to exclude particular claims from the scope of the civil rights laws. See Smith v. Robinson, 468 U.S. 992, 1012 (1984) ("[Section] 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy.") (footnote omitted), overruled by statute on other grounds, see Mrs. W. v. Tirozzi, 832 F.2d 748, 754-755 (2d Cir. 1987). While a court should not lightly conclude that a statute forecloses a remedy under the civil rights law, Congress' intent is controlling in this regard. Id. Congressional intent may be demonstrated through "express provision or other specific evidence from the statute itself." Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987). Courts have found such "other specific evidence where Congress has created a comprehensive statutory enforcement scheme, such that allowing a separate civil rights action as a means of enforcing the statute would be inconsistent with the scheme, or would undermine the purpose of the statute. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 21 (1981) (the existence of specific statutory remedies under the Federal Water Pollution Control Act and the

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these claims as part of their PLA in Corcoran II. See Defendants' Mem. at 7-13.

Marine Protection, Research, and Sanctuaries Act of 1972 manifested Congress' intent to "supplant any remedy that otherwise would have been available under § 1983"); Great American Federal Savings & Loan Ass'n et al. v. Novotny, 442 U.S. 366, 372-79 (1979) (42 U.S.C. §1985(3) could not be invoked to redress violations of Title VII, for allowing plaintiffs to bring such an action would eviscerate the comprehensive statutory scheme enacted by Congress in Title VII); DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990) (remedy under § 1983 not available for violation of equal time provisions of Federal Communications Act, because permitting such a remedy would be inconsistent with the Act's comprehensive administrative enforcement scheme), overruled on other grounds, Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423 (8th Cir. 1994); Zombro v. Baltimore City Police Dep't, 868 F.2d 1364, 1369 (4th Cir. 1989) (plaintiff could not bypass the comprehensive administrative process fashioned by Congress in the Age Discrimination in Employment Act by asserting a violation of a constitutional right under § 1983: "it is implausible that Congress would have intended to preserve the private cause of action under § 1983 for age discrimination when that cause of action would severely undermine, if not debilitate, the enforcement mechanism created by Congress under the ADEA"); Almond Hill School, et al. v. United Staes Dep't of Agriculture, 768 F.2d 1030, 1037-1039 (9th Cir. 1985) (plaintiffs could not use § 1983 to enforce the Federal Insecticide, Fungicide and Rodenticide Act, as allowing plaintiffs to do so would undermine the Act's detailed enforcement scheme).

Similarly, in the instant case, allowing plaintiffs to bring a civil rights action based on injuries arising out of a nuclear incident would undermine the main objective of the comprehensive scheme created by Congress under the Price-Anderson Act -- to encourage private sector participation in the development of domestic nuclear power through a system of limited liability and indemnification. While

Congress balanced this goal with "an acute concern for public safety by authorizing extensive regulation. . . and by imposing a carefully constructed measure of liability should nuclear accidents occur," O'Conner, 13 F.3d at 1097, it created the PLA as the exclusive remedy for injuries resulting from such accidents. Therefore, in enacting the Price Anderson Act, and in particular the 1988 Amendments Act, Congress manifested its intent to foreclose the availability of other remedies for injuries arising out of nuclear incidents.[15] Accordingly, plaintiffs are precluded from bringing their civil rights claims.

III. Plaintiffs' Civil Rights Claims are Untimely

Even if plaintiffs could bring a civil rights action based on injuries stemming from a nuclear incident, defendants would be entitled to summary judgment on the ground that plaintiffs' claims are untimely.[16] Summary

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[15] Furthermore, to the extent that plaintiffs' civil rights claims are based upon defendants' alleged violations of various NRC regulations, they are precluded by the clear language of the Atomic Energy Act. See 42 U.S.C. 2271(c) ("No action shall be brought against any individual or person for any violation under this chapter unless and until the Attorney General of the United States has advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General. . . ."; see also discussion at pp. 18-19 infra. Indeed, plaintiffs themselves conceded in Corcoran I that the AEA "does not create a private right of action for parties who wish to themselves regulate or enforce NRC regulations." 935 F. Supp. at 388n.11.

[16] As the defendants' motion in the instant case seeks dismissal of plaintiffs' Complaint and/or for summary judgment, the parties have included in their submissions various exhibits including affidavits, depositions, and Local Civil Rule 3(g) (now Rule 56.1) Statements, many of which were also submitted in Corcoran II. Because these exhibits contain information relevant to the issue of when plaintiffs' claims in the instant action accrued, certain facts

judgment is appropriate only when the submissions of the parties, taken together, "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. When deciding a motion for summary judgment, the Court must "view the evidenced in a light most favorable to the non-moving party and draw all reasonable inferences in its favor." American Casualty Co. of Reading, Pennsylvania v. Nordic Leasing, Inc., 42 F.3d 725, 927 (2d Cir. 1994). In addition, because plaintiffs are acting pro se, the Court must "read [plaintiffs'] supporting papers liberally, and . . . interpret them to raise the strongest arguments they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994); accord Soto v. Walker, 44 F.3d 169, 173 (2d Cir. 1995). Nevertheless, to defeat defendants' summary judgment motion, plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus, Co., Ltd, v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, plaintiffs must "come forward with enough evidence to support a jury verdict in [their] favor, and the motion will not be defeated merely . . . on the basis of conjecture and surmise." Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir. 1992) (internal quotation marks omitted).

The statute of limitations governing § 1983 and § 1985 actions arising in New York, borrowed from New York's general statute of limitations for personal injury actions, is three years. See Marbi Corp. of New York v. Puhekker, 9 F. Supp.2d 425, 427 (S.D.N.Y. 1998) (citing Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 331-31 (2d Cir. 1997); Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994); Blackman v. County of Nassau, 819 F.Supp. 198, 206 (E.D.N.Y.), aff'd, 14 F.3d 592 (2d Cir. 1993)). For Section 1986 actions, the statute states specifically that "no action under the

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outside of the pleadings will be considered for the purpose of determining whether plaintiffs' claims are time-barred.

provisions of this section shall be sustained which is not commenced within one year." 42 U.S.C. § 1986.

Although state law supplies the statute of limitations period for claims under § 1983 and § 1985, federal law determines when such claims accrue. See Marbi, 9 F. Supp.2d at 427; see also Ormiston v. Nelson, 117 F.3d 69, 71 (2d Cir. 1997). Under federal law, the statute of limitations begins to run "once the 'plaintiff knows or has reason to know of the injury which is the basis of his action.'" Veal v. Geraci, 23 F.3d 722 (2d Cir. 1994) (quoting Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980), cert. denied, 450 U.S. 920, 101 S. Ct. 1368 (1981)). "The reference to 'know[ledge] of the injury' does not suggest that the statute does not begin to run until the claimant has received judicial verification that the defendants' acts were wrongful . . . . Rather, the claim accrues when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm." Veal, 23 F.3d at 724 (citations omitted).[17] Therefore, "[u]nder the federal law of accrual, to be entitled to summary judgment, defendants must establish that no genuine issue of material fact exists" as to whether plaintiffs could, "with the exercise of reasonable diligence," have become aware of their § 1983 and § 1985 claims more than three years before bringing this action, or more than

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[17] In contrast, in Corcoran II, which was brought as a PLA, the Court applied state law to determine when plaintiffs' claims accrued. See Corcoran II, 1997 WL 603739, at *3 (applying Section 214-c of the New York Civil Procedure law, which provides that a personal injury alleged to have been caused by the latent effects of exposure to a substance accrues on the date of the discovery of the injury, meaning "discovery of the condition on which the claim was based and not discovery of the etiology of that condition) (internal quotation marks and citations omitted). Nevertheless, the facts relevant to each determination are virtually identical, and, to a large extent, the facts relied upon by the parties in this action were developed as part of the pretrial discovery in Corcoran II.

one year before bringing their §1986 claim in this action. D'Angelo v. City of New York, et al., 929 F.Supp. 129, 132 (S.D.N.Y. 1996).

The undisputed facts relevant to the accrual date of plaintiffs' claims are as follows. Plaintiffs allege that Eugene Corcoran was exposed to radiation in June, 1985. Complaint, ¶¶ 44-56. On March 16, 1992, Eugene Corcoran was diagnosed with CML by Dr. Romeo Balagot. See Corcoran II Statement of Undisputed Facts of New York Power Authority and Westinghouse Electric Corporation Pursuant to Local Civil Rule 3(g) ("Defendants' 3(g) Statement") at ¶5, attached as Exhibit 1 to the Affirmation of Wendy Fleishman, Esq., dated March 2, 1998; Complaint at ¶ 151. Dr. Nirmala Shevde confirmed this diagnosis on March 20, 1992. See Plaintiffs' Corcoran II Response to Defendants' Statement of Undisputed Facts Pursuant to Local Civil Rule3(g) (Plaintiffs' 3(g) Response)") at ¶ 5, attached as Exhibit J to the Declaration of Carrie Corcoran ("Corcoran Decl.") dated May 12, 1998; Deposition of Carol Ellis ("Ellis Dep.") at 14-17, attached as Exhibit 4 to the Declaration of Wendy Fleishman, Esq., dated June 19, 1998 ("June 19 Fleishman Decl."). In examining Mr. Corcoran, each of these doctors asked Mr. Corcoran routine questions about his occupation and, as plaintiffs acknowledge, told him that radiation and/or certain chemicals can predispose an individual to leukemia. See Plaintiffs' Mem. in Opposition at 81.

In the Spring or Summer of 1992, Mr. Corcoran called Stephen Coli, a millwright with whom Mr. Corcoran had worked in 1985 and who was again working at IP3. Mr. Corcoran told Coli that he had been diagnosed with CML and asked Coli to make inquiries regarding their possible exposure to radiation at IP3 in the summer of 1985. See Defendants' 3(g) Statement at ¶ 17; Plaintiff' 3(g) Response at ¶ 17. Deposition of Stephen Coli at 79-80, 96-98, 103-104, 163-165, attached as Exhibit 13 to the June 19 Fleishman Decl. In the Spring of 1992, Mr. Corcoran's ex wife, Carol Ellis,

suggested that he see a lawyer about the possibility of his pursuing a radiation claim relating to his work at IP3. See Defendants' 3(g) Statement at ¶ 18; Plaintiffs' (3)g Response at ¶ 18; Ellis Dep. at 25-30. On December 21 1992, Eugene Corcoran was examined by Dr. Esperanza Papadopoulous, a hematologist/oncologist at Memorial Sloane Kettering Cancer Center in New York City. Defendants' 3(g) at ¶16; Plaintiffs' 3(g) Response at ¶ 16.

Notwithstanding these facts, plaintiffs claim that they "were unaware that they had a cause of action against the Defendants . . . until January 17, 1995, when they spoke to Stephen Coli, a coworker of Eugene Corcoran, who revealed facts and information not previously known to the Plaintiffs, which form the basis of the allegations in this lawsuit." See Complaint at ¶ 6; see also Plaintiffs' Mem. in Opposition at 81 ("I had no way to know my father had been exposed to radiation until facts began to unravel after January 17, 1995, the date my mother first spoke to Stephen Coli and he shed light on many previously unknown facts."). Thus, plaintiffs contend that January 17, 1995 is "the earliest date of accrual" on any of their claims. Id. Furthermore, plaintiffs argue that their "cover-up claims" did not accrue until October 2, 1998, the date they received the Court's opinion dismissing their claims as untimely in Corcoran II. See Plaintiffs' Mem. in Opposition at 82.

Plaintiffs' arguments have no merit. The undisputed facts establish that in March, 1992, or at the latest, by the end of 1992, Mr. Corcoran knew or had reason to know of his injury, and of the allegedly impermissible conduct that caused him harm. Mr. Corcoran's request that Mr. Coli investigate whether there had been a radiation incident at IP3, as well as his statement to Dr. Papadopoulous, indicate that Mr. Corcoran had formed a belief that he had been exposed to radiation while working at IP3, and that there was a possible connection between the alleged exposure and his illness. Furthermore, Mr. Corcoran knew when he was diagnosed with CML in 1992, and told that radiation

exposure was a possible cause, that defendants had failed to notify him of any exposure, administer tests, or provide him with written notification of his radiation dose back in 1985. Thus, to the extent that plaintiffs' conspiracy claims allege that defendants deliberately withheld such information or services, Mr. Corcoran was aware of the basis of such claims when he was diagnosed in 1992. In addition, once he was on notice that he might have had a claim for radiation injury, Mr. Corcoran could, with reasonable diligence, have discovered the defendants' alleged failure to document surveys conducted at the #32 stop valve, or to maintain records of such surveys.[18] Stephen Coli was not the source of such information, and plaintiffs cannot attribute their failure to investigate or bring suit based on Coli's lack of assistance.[19]

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[18] This conclusion is consistent with the Court's determination in Corcoran II that by March 20, 1992, Mr. Corcoran was aware of his illness and with reasonable diligence could have discovered any improper concealment of his exposure to radiation. See 1997 WL 603739, AT *6.

[19] This Court need not determine when plaintiffs' witness intimidation claim accrued, for neither the Complaint no plaintiffs' explanations of the Complaint offered in their motion papers allege facts sufficient to give rise to a claim for damages under §1985(2). The essential elements of a §1985(2) claim for witness intimidation are (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff. See Chalal v. Paine Webber Inc., 725 F.2d 20 (2d Cir. 1984), plaintiffs cannot demonstrate a compensable injury arising out of any such conspiracy. Plaintiffs contend that Hugh Gilmartin's warning caused Coli to withhold "very valuable information" from plaintiffs until January, 1995, at which point it was too late to file a timely notice of claim, and thus plaintiffs lost their remedy under the Price-Anderson Act in Corcoran II. See Plaintiffs' Mem. in further Opposition at 12-13. Plaintiffs' contention is untenable in light of the Court's finding in Corcoran II that Mr. Corcoran's claims accrued, at the latest, on March 20,

The undisputed facts demonstrate that plaintiffs' claims accrued, if at all, by no later than the end of 1992. Because plaintiffs did not file their Complaint in this action until December 17, 1997, more than five years after their claims accrued, they have failed to meet the applicable three and one-year statutes of limitations. Defendants are therefore entitled to summary judgment on the ground that plaintiffs' civil rights claims are time-barred.[20]

1992, when his diagnosis of CML was confirmed. See 1997 WL 603739, at **4-6. This conclusion was drawn despite plaintiffs' contention in Corcoran II, as well, that Gilmartin deterred Coli from pursuing an investigation. See id. at 8. Because the Court determined that Mr. Corcoran possessed sufficient knowledge as of March 20, 1992 to bring his PLA claims, Coli's alleged withholding of information until 1995 was immaterial to plaintiffs' ability to file a timely notice of claim in Corcoran II. Thus, plaintiffs have failed to demonstrate that they were injured by any alleged conspiracy to intimidate Stephen Coli.

[20] Plaintiffs argue that the doctrine of equitable estoppel should apply to preclude defendants from raising a statute of limitations defense, claiming that defendants' failure to comply with federal regulations requiring personnel monitoring, maintenance of survey records, and written notification of radiation dose interfered with their ability "to know of, and prove their claims for injuries." Plaintiffs' Mem. in Opposition at 82-83. This argument has no weight with respect to the application of equitable estoppel. Questions regarding the tolling of the statute of limitations in civil rights actions are governed by state law. Babigan v. Association of the Bar of the City of New York, 744 F.Supp. 47, 50 (S.D.N.Y. 1990 (citing Wilson v. Garcia, 471 U.S. 261, (1985)). "'Under New York law, a defendant will be equitably estopped from asserting a statute of limitations defense if the defendant's misconduct causes the delay between the accrual of the cause of action and the institution of the legal proceeding.'" Babigan, 744 F.Supp. at 51-52 (quoting Salahuddin v. Coughlin, 647 F.Supp. 49, 52 (S.D.N.Y. 1986)). Here, defendants' alleged misconduct took place in 1985, before accrual of plaintiffs' claims in 1992. Thus, defendants' failure to provide Mr. Corcoran with certain information or to

IV. Plaintiffs' Cross-Motion to Amend the Complaint

In recognition of the merits of aspects of defendants' motion to dismiss and/or for summary judgment, plaintiffs have moved to amend their Complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, see Plaintiff' Mem. in Opposition at 73, and have submitted a Proposed Amended Complaint for the Court's consideration. See Plaintiffs' Exhibit B, attached to Corcoran Decl. The Proposed Amended Complaint (1) names the defendants in their individual, as well as official, capacities, see ¶¶ 16-17; (2) adds Westinghouse and NYPA as defendants; (3) adds "policy and practice" claims against NYPA and its defendant employees, see ¶¶ 359-380; and (4) adds a claim for "witness intimidation." See ¶¶ 329-346.[21]

"Although Fed. R. Civ. P. 15(a) provides that the district court should freely grant leave to amend when justice so requires, it is proper to deny leave to replead where there is no merit in the proposed amendments or amendment would be futile." Hunt v. Alliance North American Government Income Trust, Inc., No. 97 Civ. 9477, 1998 WL 727060, *5 (2d Cir., Oct. 15, 1998) (citations omitted). Under these standards, denial of plaintiffs' request to amend their Complaint is warranted. Plaintiffs' first proposed amendment -- to name defendants in their individual, as well as official capacities -- would be futile, because, as discussed earlier, plaintiffs' civil rights claims against defendants are precluded under the Price-Anderson Act, and in any event are time-barred. Suing defendants in their individual capacities would not alter either conclusion. Amending the Complaint to add NYPA and Westinghouse

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maintain records in 1985 could not have cause plaintiffs' delay in filing this action, more than five years after their claims accrued.

[21] The Proposed Amended Complaint also eliminates the "Doe" defendants. See Plaintiffs' Mem. in Opposition at 73.

as defendants in this action would be equally futile, as plaintiffs' civil rights claims against NYPA and Westinghouse would also be foreclosed under the Price-Anderson Act, or time-barred under the applicable statute of limitations.[22]

In addition, plaintiffs' "policy and practice" and "witness intimidation" claims in the proposed Amended Complaint are not viable claims. The "policy and practice" claims allege that NYPA and the NYPA defendants "knowingly

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[22] Presumably, in an attempt to avert a statute of limitations time-bar, plaintiffs argue that under Fed. R. Civ. P. 15(c), their Proposed Amended Complaint should relate back to the filing of the original Complaint in this action, or, in the alternative, to the filing of their prior lawsuits against NYPA and Westinghouse in Corcoran I. See Plaintiffs' Mem. in Opposition at 74-76; Plaintiffs' Mem. in Further Opposition at 19. Relation back to the filing of the original Complaint in this action would be futile, however, because the original Complaint was not timely filed. Furthermore, the relation back of an amendment to the filing of a complaint in a prior lawsuit is not permitted by Rule 15(c). See Bailey v. Northern Ind. Public Serv. Co., 910 F.2d 406 (7th Cir. 1990) ("Rule 15(c), by its terms, only applies to amended pleadings in the same action as the original, timely pleading"); Rayo v. New York, 882 F.Supp. 37, 40 (N.D.N.Y. 1995) ("The relation back argument has its application only in instances where an original pleading is amended . . . [t]he amendment does not . . . relate back to any prior proceedings which are not a part of the action in question") (citing Fed. R. Civ. P. 15(c)); see also GNK Enterprises, Inc. v. Conagra, 197 B.R. 444, 448-449 (Bankr. S.D.N.Y. 1996) (relation back of an untimely-filed adversary proceeding in the Bankruptcy Court to a separate pending, but stayed, lawsuit in the District Court not permitted by Rule 15(c)) (citing Rayo, 882 F.Supp. at 40). Plaintiffs' reliance on Lopez v. Ward, 681 F.Supp. 192 (S.D.N.Y. 1988), is misplaced. See Plaintiffs' Mem. in Further Opposition at 19. In Lopez, the court held that plaintiff's amended claims related back to his original complaint in the *same* action, not to his complaint in a prior lawsuit. See 681 F.Supp. at 195.

permitted to exist and failed to correct business practices that deprived workers at [IP3] of the rights, privileges, and protections afforded under the federal regulations." Proposed Amended Complaint at ¶ 360; see ¶¶ 361-380. These claims merely restate the allegations in the original Complaint that defendants knowingly failed to comply with various NRC regulations, depriving Mr. Corcoran of certain rights. This court has determined that such claims are not actionable because no private right of action exists for enforcement of the AEA, or of the regulations promulgated thereunder. See infra note 15. Plaintiffs' proposed "policy and practice" claims would be subject to dismissal for the same reasons, and, as with their other claims, would also be time-barred. Similarly, plaintiffs' "witness intimidation" claim in the Proposed Amended Complaint simply repeats the facts alleged in the original Complaint, although the claim was not explicitly pleaded there. Yet, as noted above, plaintiffs' original Complaint fails to state a claim for witness intimidation under § 1985(2). See infra note 19. The proposed amendment adds nothing that would save the original witness intimidation claim from dismissal. For the foregoing reasons, I respectfully recommend that plaintiffs' request for leave to amend their Complaint be denied.

V. Defendants' Motion for Sanctions

Defendants have moved for attorneys' fees, costs, and sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, and for an order enjoining plaintiffs from commencing further litigation against defendants and related parties, pursuant to 28 U.S.C. § 1651. See Defendants' Memorandum of Law in Support of Their Motion for Sanctions ("Defendants' Sanctions Mem."), passim. Defendants' contend that there is no factual or legal basis for plaintiffs' claims and that they have brought this action merely to harass. For the following reasons, I respectfully recommend that defendants' motion be denied.

Under Fed. R. Civ. P. 11, as amended in 1993, "sanctions may be imposed on a person who signs a pleading, motion, or other paper for an improper purpose such as to delay or needlessly increase the cost of litigation, or does so without a belief, formed after reasonable inquiry, that the position espoused is factually supportable and is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." Caisse National de Credit Agricole-CNCA, New York Branch v. Valcorp, Inc., 28 F.3d 259, 264 (2d Cir. 1994); see Fed. R. Civ. P. 11. By its terms, Rule 11 applies to pro se litigants as well as attorneys. "Although pro se parties are held to a more lenient standard than professional counsel, nothing prevents a court from imposing Rule 11 sanctions on a pro se litigant who has not complied with the guidelines set forth in Rule 11." Baash v. Reyer, 827 F.Supp. 940, 944 (E.D.N.Y. 1993) (citations omitted); see Cornett v. Bank of New York, No. 91 Civ. 0605 (CSH), 1992 WL 88197, at *6 (S.D.N.Y. April 17, 1992). Furthermore, because plaintiffs in this case have "shown an ability to find the law and make legal arguments, "they may be held to a higher standard than other pro se parties. Cornett, 1992 WL 88197, at *6. Nonetheless, under the amended version of Rule 11, the imposition of sanctions is discretionary rather than mandatory, and, as the Second Circuit has advised, Rule 11 sanctions should be imposed with caution. See Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994).

Defendants argue that because plaintiffs have asserted in the instant action "the same discredited arguments based on the same factual circumstances" alleged in plaintiffs' prior lawsuit against NYPA and Westinghouse, this Court should find that the current action was interposed for an improper purpose. See Defendants' Sanctions Mem. at 16 (citing Knipe, 19 F.3d at 77). In Knipe, the Second Circuit upheld the district court's imposition of sanctions, finding that

because the plaintiff's complaint was filed four days after the district court had dismissed a previous action by the plaintiffs advancing the same underlying legal arguments in the context of the same factual circumstances, there were sufficient grounds for finding that the new pleading was interposed for an improper purpose. See 19 F.3d at 77. While the Complaint in the instant action is based on the same underlying set of facts as those alleged in plaintiffs' prior lawsuit, the Complaint does contain legal claims which were not considered in the prior suit, and which this Court has held could not have been raised as part of plaintiffs' PLA in Corcoran I. In addition, while the facts relevant to determining the accrual dates for plaintiffs' claims in each action are virtually identical, different legal standards apply in each case. Therefore, this is not clearly a case involving "successive complaints based upon propositions of law previously rejected" so as to constitute harassment for the purposes of Rule 11. Knipe, 19 F.3d at 77 (quoting Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986)); see also Cornett, 1992 WL 88197, at *6 (finding that plaintiff had filed suit solely to harass the defendants where plaintiff had already litigated the major issues of the case in another court).

Defendants also contend that plaintiffs should be sanctioned because no evidentiary support exists for their factual assertions. See Defendants' Sanctions Mem. at 18-21. "In considering sanctions regarding a factual claim, the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial." Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988), rev'd on other grounds sub nom., Pavelic& LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). As neither the Court's dismissal of plaintiffs' claims in Corcoran II nor the dismissal in the instant action is based on the factual merits of the claims, neither decision considered whether an objectively reasonable evidentiary basis exists for plaintiffs'

claims. Moreover, in Corcoran II, pretrial discovery was focused solely on the issue of when plaintiffs' claims accrued, and no pretrial discovery was conducted in the instant action. Thus, this Court declines to exercise its discretion to impose sanctions on this basis.

Defendants further assert that plaintiffs should be sanctioned under Rule 11 because they have advanced patently frivolous legal arguments that are not warranted by existing law. See Defendants' Sanctions Mem. at 22-25. For purposes of Rule 11 sanctions, "an argument constitutes a frivolous legal position . . . if, under an objective standard of reasonableness, it is clear . . . that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands." Morley v. Ciba-Geigy Corp., v. City of New York, 66 F.3d 21, 25 (2d Cir. 1995); see also Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("[W]here it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands, Rule 11 has been violated."). Defendants contend that the frivolity of plaintiffs' claims in the instant action is demonstrated by plaintiffs' direct contravention of Judge Cote's prior rulings that a PLA is plaintiffs' exclusive remedy, and that plaintiffs' claims were not timely filed. See Defendants' Sanctions Mem. at 22-23. However, as plaintiffs' civil rights claims were not before the Court in Corcoran I, no ruling was made as to whether a civil rights action based on injuries arising out of a nuclear incident could be asserted as part of, or independent from, a PLA. In addition, although this Court has found that the Price-Anderson Amendments Act forecloses such claims, there is meager direct legal authority on this issue. Therefore, this Court is not prepared to find that it was patently clear that plaintiffs' civil rights claims had "no chance of success under the existing precedents." Furthermore, as noted above, the legal standard applied by Judge Cote in Corcoran II to

determine when plaintiffs' state law claims accrued is different from the standard governing the accrual of civil rights claims. Thus, it was not clear from Judge Cote's findings in Corcoran II that plaintiffs' civil rights claims, too, would be deemed untimely.

Finally, defendants ask this Court to grant an injunction barring plaintiffs from commencing further litigation against NYPA, Westinghouse, or their employees in connection with Eugene Corcoran's alleged injuries incurred at IP3. See Defendants' Sanctions Mem. at 26-27. "It is well settled that federal courts possess the authority to enjoin parties from future vexatious litigation." Carlin v. Gold Hawk Joint Venture, 778 F.Supp. 686, 694 (S.D.N.Y. 1991) (citing 28 U.S.C. § 1651; In Re Hartford Textile Corp., 681 F.2d 895, 897 (2d Cir. 1982) (per curiam), cert. denied, 459 U.S. 1206 (1983)). In deciding whether to enjoin a party from bringing future lawsuits, a court must determine if "a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." Safir v. United States Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986) (cert. denied, 479 U.S. 1099 (1987). However, "litigious affinity alone does not support the grant of an injunction, for 'access to the Courts is one of the cherished freedoms of our system of government.'" Kane v. City of New York, 468 F.Supp. 586, 590 (S.D.N.Y.), aff'd, 614 F.2d 1288 (2d Cir. 1979) (quoting Ex Parte Tyler, 70 F.R.D. 456, 457 (E.D.Mo. 1975)); see also Carlin, 778 F.Supp. at 694 ("[D]enial of access to the Court is a serious matter and injunctions against such access must be issued only sparingly.") (citations omitted). While plaintiffs have been persistent -- perhaps even relentless -- in seeking a remedy for the wrongs that they perceive were committed, the history of the litigation in the instant case does not reflect the level of vexatiousness or harassment that has led courts in this Circuit to issue such injunctions. See, e.g., Sassower v. Sansverie, 885 F.2d 9, 10-11 (2d Cir. 1989) (per curiam) (upholding district court's enforcement of an injunction issued in response to litigants' "avalanche of litigation"); In

Re Hardford Textile Corp., 681 F.2d at 896-897 (issuing injunction after "almost unparalled history" of frivolous and repetitious claims, motions, petitions, demands, and appeals arising out of bankruptcy court's denial of executrix's claim, and after warning that continuation may result in injunction); Kane, 468 F.Supp. at 590-591 (enjoining pro se plaintiff from instituting any further actions relating to his dismissal from employment where plaintiff had brought eleven prior proceedings concerning his discharge, it was apparent that the litigation was baseless, and it was clear that the courts were being used as a vehicle of harassment).

In recommending the denial of defendants' motion for sanctions, the Court is not unmindful of the costs incurred by defendants in responding to the lengthy pleadings and numerous claims asserted in this litigation (as well as the ancillary state-court litigation over Freedom of Information Act requests), or of the dubious support for many of plaintiffs' claims. Although proceeding pro se, as a young attorney embarking on her career, plaintiff should be sensitive to the distinction between vigorous advocacy and indiscriminate, obsessive, and personalized litigation tactics. Nevertheless, plaintiffs have initiated what have been in effect only two lawsuits against defendants and their respective employers; the only discovery that has taken place was on the legitimate issue of the timeliness of the filing of a notice of claim in the first action -- an issue raised by the defendants -- and both cases have been disposed of on the pleadings.

Accordingly, I recommend that defendants' motion for sanctions and injunctive relief be denied. Nevertheless, I also respectfully recommend that plaintiffs be warned that, apart from a direct appeal of this Court's decision, any further litigation involving the same issues and/or parties will be considered frivolous and vexatious, and may result in the issuance of injunctive relief, as well as an award of attorney's fees and sanctions against them. See Carlin, 778 F.Supp. at 694.

CONCLUSION

For the reasons stated above, I respectfully recommend that Defendants' Motion to Dismiss Plaintiffs' Complaint and/or for Summary Judgment be granted, that plaintiffs' Cross-Motion to Amend the Complaint be denied, and that Defendants' Motion for Sanctions be denied.

Pursuant to 28 U.S.C. § 636(b)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten days from service of this Report to file written objections. See also Fed. R. Civ. P. 6(a) and (e). Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Denise L. Cote, U.S.D.J., and to the chambers of the undersigned, Room 1660. Any requests for an extension of time for filing objections must be directed to Judge Cote. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 149-52 (1985), reh'g denied, 474 U.S. 1111 (1986); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993) cert denied, 513 U.S. 822, 115 S.Ct. 86 (1994); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert denied, 506 U.S. 1038, 113 S.Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

Respectfully submitted,

s/

Theodore H. Katz
United States Magistrate Judge

Dated: December 1, 1998
New York, New York

Copies mailed to:

Carrie Corcoran, Pro Se
8297 South Ridge Drive
Macungie, Pennsylvania 18062

Peter J. McKenna
Wendy Fleishman
David J. Abrams
Sina Toussi
Attorneys for Defendants
Skadden, Arps, Slate, Meagher & Flom LLP
919 Third Avenue
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARRIE CORCORAN, as Executrix of the Estate of Eugene Corcoran, deceased, and CARRIE CORCORAN, individually,

Plaintiffs,

-v-

LEROY W. SINCLAIR; J.P. BAYNE; JOHN V. BRONS; WILLIAM JOSIGER; J. RUSSEL; DENNIS QUINN; JOSEPH PERROTTA; HUGH GILMARTIN; IAN MEW; ROBERT DESCHAMPS; PAUL SAUNDERS; JOHN NEFF; MARYANN CHAUBARD; THOMAS MICHAEL PHILLLIPS; RICK MOULD; CHARLES FLORIN; STEVE TENCZA, and DOEs 1 through 25, inclusive,

Defendants.

97 Civ. 9286 (DLC)

OPINION and ORDER

APPEARANCES:
For Plaintiffs:
Carrie Corcoran, Pro Se
8297 South Ridge Drive
Macungie, PA 18062

For Defendants
Wendy Fleishman, Esq.
Skadden Arps Slate Meagher & Flom
919 Third Avenue
New York, NY 10022

DENISE COTE, District Judge:

Carrie Corcoran, as Executrix of the Estate of Eugene Corcoran, and on her own behalf, seeks redress for injuries allegedly caused when her father, Eugene Corcoran ("Corcoran"), was exposed to radiation at the Indian Point Nuclear Power Plant. The defendants move to dismiss or for summary judgment and for sanctions. The plaintiffs cross-move to amend the complaint. For the reasons given below, the defendants' motion to dismiss or for summary judgment is granted. The defendants' motion for sanctions is denied. The plaintiffs' cross-motion to amend the complaint is denied.

Background

The facts set forth below are as alleged by the plaintiffs or undisputed. Corcoran repaired machinery as a millwright for Westinghouse Electric Corporation ("Westinghouse"). In June through August 1985, Corcoran was assigned to work temporarily at the Indian Point 3 Nuclear Power Plant ("IP3"). IP3 is a federally-licensed plant with an operating license held by the New York Power Authority ("NYPA"). Corcoran was assigned to perform maintenance work on the steam turbine and associated steam intake system serving the plant, including the "stop valve." In 1985, the steam generator tubes that carried radioactive water were defective and leaked radioactive particles and substances into the stop valve. The leaking radioactive material was odorless and colorless and was therefore undetectable by Corcoran. Although the defendants, employees of Westinghouse and the NYPA, knew that the steam generator tubes were defective and that the area had been dangerously contaminated with radiation, they failed to alert Corcoran to the presence of radiation, to provide him with protective clothing or with personal monitoring equipment, and failed to barricade the area immediately upon learning of the contamination.

Corcoran was exposed to radiation "well in excess of the permissible occupational dose limits for workers in restricted areas of nuclear power plants" under applicable federal regulations. Despite this exposure, defendants failed to notify Corcoran that he was exposed to radiation, to provide written notification of the actual or estimated radiation dose that he sustained, or to administer medical tests to assess the level of radiation exposure.

In June 1985, Corcoran experienced "acute radiation sickness." At the time, however, his symptoms were not diagnosed as resulting from radiation exposure and Corcoran did not associate the illness with radiation. For several years following this acute episode Corcoran continued to suffer from an illness of unexplained etiology. On March 16, 1992, Corcoran was diagnosed with chronic myeloid leukemia ("CML"), a fatal disease of the blood and immune systems that is "brought on by excessive exposure to nuclear radiation." The diagnosis was confirmed on March 20, 1992. The doctors who examined Corcoran explained CML's link to radiation and asked Corcoran about his work history. In the spring or summer of 1992, Corcoran's ex-wife Carol Ellis ("Ellis") discussed with Corcoran the idea of hiring a lawyer to explore a radiation claim. In December 1992, after an asbestos screening test, Corcoran filed a lawsuit alleging that his illness had been caused by exposure to asbestos.

Sometime in 1992, Corcoran called Stephen Coli, a millwright with whom Corcoran had worked at IP3 in the summer of 1985, to ask Coli to investigate whether Corcoran had been exposed to radiation at IP3. Coli was still employed by Westinghouse when he began his investigation. Defendant Hugh Gilmartin ("Gilmartin"), a NYPA employee, learned of Corcoran's illness and Coli's investigation and warned Coli not to "drag things up." After speaking with Gilmartin, Coli ceased his

investigation out of fear that he would be fired, reported to Corcoran that his investigation led to a "dead end," and discouraged Corcoran from pursuing a claim for radiation exposure.

According to the plaintiffs, CML generally has a latency period of two to ten years. The onset of the leukemia may in some cases be prevented, or its development arrested, by a bone marrow transplant performed prior to the appearance of the disease or soon after its discovery. Corcoran had two allogenetically identical potential bone marrow donors in his identical twin brother and a second brother, and had a bone marrow transplant in March 1993. The transplant, however, failed to arrest the spread of leukemia, perhaps because it was conducted several years after Corcoran's exposure to radiation. Corcoran died on September 25, 1993, at the age of fifty.

In January 1994, Corcoran's daughter, Carrie Corcoran ("Ms.Corcoran") and her mother, Carol Ellis, consulted several lawyers to inquire about bringing a lawsuit. Two lawyers investigated the cause of Corcoran's injuries and death and posted a notice in the millwright's union hall. The notice sought information from anyone who knew about radiation leaks at IP3 in 1985. On January 17, 1995, Coli called the lawyers in response to the notice. Based on the information learned from Coli, the plaintiffs filed a lawsuit against the NYPA and WEDCO Corporation. Counsel for plaintiffs withdrew, and plaintiffs proceeded pro se. Plaintiffs pro se filed a second lawsuit against Westinghouse. The two actions were consolidated as Corcoran v. New York Power Auth., Nos. 95 Civ. 5357, 95 Civ. 8102 ("Corcoran I "). In Corcoran I plaintiffs alleged that the defendants were liable for Corcoran's death based on violations of state law and federal regulations. The defendants' motion to dismiss was granted in part and denied in part

on July 29, 1996. See Corcoran v. New York Power Auth., 935 F.Supp. 376 (S.D.N.Y.1996). This Court found that because plaintiffs' claims arose out of a nuclear incident, the plaintiffs' exclusive right of action was a "public liability action" ("PLA") under 42 U.S.C. § 2210(n)(2) of the Price-Anderson Amendments Act of 1988. Because the rules of decision for a PLA are derived from state law, the Court dismissed the plaintiffs' claims that the defendants had wilfully violated certain federal statutes and regulations. The motion to dismiss the remaining state law claims was denied.

After a period of discovery limited to the timeliness of the plaintiffs' claims the Court granted defendants' motion for summary judgment. See Corcoran v. New York Power Auth., Nos. 95 Civ. 5357, 95 Civ. 8102, 1997 WL 603739 (S.D.N.Y. Sept. 29, 1997). The Court found that the plaintiffs had failed to file a timely notice of claim against NYPA as required by New York General Municipal Law with respect to the negligence, battery, fraud, wrongful death, and survival claims. Plaintiffs' arguments for equitable estoppel were rejected. The claims against Westinghouse were dismissed on the grounds that New York Workers' Compensation Law provides the exclusive remedy for the claims of unintentional torts and the plaintiffs failed to produce evidence of intentional torts (which are not covered by the Workers' Compensation Law). Even if the plaintiffs had properly alleged an intentional tort, the Court ruled, the claim would have been barred by the statute of limitations. On March 7, 1997, plaintiffs filed a motion for reconsideration of the Opinion granting summary judgment and moved to amend the complaint to add a cause of action under 42 U.S.C. § 1983 ("Section 1983"). On May 27, 1998, the Court denied the motion for reconsideration and the motion to amend. See Corcoran v.. New York Power Auth., Nos. 95 Civ. 5357, 95 Civ. 8102, 1998 WL 274290 (S.D.N.Y. May 27, 1998).

On December 17, 1997, while the motion for reconsideration in Corcoran I was pending, plaintiffs filed this action against officers and employees of NYPA, and against employees of Westinghouse. In this action plaintiffs allege that these individuals violated Section 1983, 42 U.S.C. § 1985 ("Section 1985"), and 42 U.S.C. § 1986 ("Section 1986").

On February 3, 1998, the Court referred this case to Magistrate Judge Theodore H. Katz for all pretrial purposes and for the preparation of a Report and Recommendation pursuant to 28 U.S.C. § 636(b). On March 2, 1998, the defendants moved to dismiss or for summary judgment and for sanctions. The plaintiffs cross-moved to amend the complaint. On December 1, 1998, Judge Katz issued a thorough and well-reasoned Report recommending that the motion to dismiss or for summary judgment be granted, and the motions for sanctions and to amend the complaint be denied.

Rule 72 of the Federal Rules of Civil Procedure and the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A), provide the standard for district court review of a federal magistrate judge's order. For dispositive matters, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P. 72(b). The Court shall make a de novo determination of those portions of the report to which objections are made. Id.; United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir.1997). The plaintiffs having timely objected to portions of the Report addressing dispositive matters, the Court will review the defendants' motion to dismiss or for summary judgment de novo.

For recommendations by Judge Katz regarding non-dispositive matters to which objections are made, the Court "shall modify or set aside any portion of the

magistrate judge's order found to be clearly erroneous or contrary to law." Rule 72(a), Fed.R.Civ.P. The plaintiffs having timely objected to those recommendations regarding non-dispositive matters, the Court will review those portions of the Report for clear error.

Standard for a Motion to Dismiss

A court may dismiss an action pursuant Rule 12(b)(6), Fed.R.Civ.P., only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which will entitle him to relief." ' Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir.1994) (quoting Conley v. Gibson, 355 U.S. 41, 45- 46 (1957)). In considering the motion, the court must take "as true the facts alleged in the complaint and draw[ ] all reasonable inferences in the plaintiff's favor." Jackson Nat. Life Ins. v. Merrill Lynch & Co. 32 F.3d 697, 699-700 (2d Cir.1994). The Court can dismiss the claim only if, assuming all facts alleged to be true, plaintiff still fails to plead the basic elements of a cause of action.

When a plaintiff is proceeding pro se, the court must liberally construe the complaint. See, e.g., Boddie v. Schneider, 105 F.3d 857, 860 (2d Cir.1997). "A complaint should not be dismissed simply because a plaintiff is unlikely to succeed on the merits." Baker v. Cuomo, 58 F.3d 814, 818 (2d Cir.1995).

Standard for Summary Judgment

Under Rule 56(c), summary judgment may only be granted if the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The substantive law determines what facts are material to the outcome of the litigation. See Anderson, 477 U.S. at 248. The initial burden is on the moving party and all facts are viewed "in the light most favorable to the

non-moving party." American Casualty Co. of Reading, PA v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir.1994) (internal citations omitted). Once the moving party meets his burden, the non-moving party has the burden of presenting "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). Accord Rexnord Holdings, Inc. v. Biderman, 21 F.3d 522, 525-26 (2d Cir.1994). The litigant opposing summary judgment may not rest upon mere conclusory allegations or denials. See Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 101 (2d Cir.1997) (internal citations omitted).

Where, as here, a party is proceeding pro se, this Court has an obligation to "read [the pro se party's] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994). Accord Soto v. Walker, 44 F.3d 169 (2d Cir.1995). Nonetheless, a pro se party's "bald assertion," completely unsupported by evidence, is insufficient to overcome a motion for summary judgment. Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir.1991).

Discussion

A. Appearance pro se on behalf of Corcoran's estate

Defendants argue that Ms. Corcoran may not proceed pro se on behalf of her father's estate. [FN1] To appear "pro se " is to appear for one's self; a person "may not appear on another person's behalf in the other's cause." Iannoccone v. Law, 142 F.3d 553, 558 (2d Cir.1998). Consequently, an action by an estate may not be conducted pro se where the estate has beneficiaries or creditors other than the pro se litigant. Id. at 559; Pridgen v. Andresen, 113 F.3d 391, 393 (2d Cir.1997).

FN1. Judge Katz did not address this argument in the Report.

Defendants argue that Ms. Corcoran may not proceed pro se as Executrix of her father's estate because she is not its sole beneficiary. In his Last Will and Testament Corcoran left all shares of a certain stock to Patricia Ann Collins ("Collins") and the remainder of the Estate to Ms. Corcoran. There is no dispute, however, that all shares of the stock left to Collins have been received by her and that Collins has released all further claims against the Estate. Ms. Corcoran appears to have been the sole remaining beneficiary of the Estate at the time this action was filed, and would be the sole beneficiary of any award in this action. In addition, Ms. Corcoran also brings this action to remedy injuries sustained by her. Under these circumstances, the Court will not dismiss the complaint on the ground that Ms. Corcoran proceeds pro se. See Corcoran I, 1997 WL 603739 at *1 n. 1.

B. Section 1983

1. Preclusion of statutory claims by a PLA or the AEA

Defendants next move to dismiss plaintiffs' claims of statutory and regulatory violations brought under Section 1983 on the ground that they are precluded by both the existence of a PLA and the Atomic Energy Act ("AEA"). Section 1983 provides in relevant part

> Every person who, under color of any statutes, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured.

42 U.S.C. § 1983. The statute offers a mechanism through which remedies may be sought for violations of the

Constitution and federal statutes. Maine v. Thiboutot 448 U.S. 1, 4 (1980); Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2d Cir.1998). [FN2]

> FN2. Section 1983 applies only to state actors. See, e.g., Okunieff v. Rosenberg, 996 F.Supp. 343, 348-49 (S.D.N.Y.1998) aff'd, 166 F.3d 507 (2d Cir.1999). Plaintiffs have named employees of Westinghouse, a private corporation, as defendants and argue that for purposes of this action they are state actors. Because this case is dismissed on other grounds, the Court declines to address whether the Westinghouse defendants are state actors.

In order to seek redress through Section 1983 a plaintiff must first assert that the violation infringed on a federal right. Blessing v. Freestone, 117 S.Ct. 1353, 1359 (1997). A federal statute confers a federal right if (1) Congress intended the statutory provision to benefit the plaintiff; (2) the right "assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence;" and (3) the statute "unambiguously impose[s] a binding obligation on the States ." Id. (internal quotation omitted). Plaintiff has the burden "to identify with particularity" the rights she claims and the specific statutory provisions that she asserts apply. Id. at 1360. Even if the plaintiff has demonstrated that a federal statute or its regulations creates a federal right, she will have established only a rebuttable presumption that the right is enforceable under Section 1983. Id.

Plaintiffs argue that regulations issued by the Nuclear Regulatory Commission ("NRC") establishing "Standards for Protection Against Radiation," 10 C.F.R. part 20, confer federal rights. Specifically, plaintiffs allege that the following NRC regulations [FN3] addressed to those in "restricted areas" [FN4] create federal rights:

regulations that require a nuclear power plant to maintain radiation exposures "as low as reasonably achievable," [FN5] to limit the level of radiation exposure for individuals in a restricted area, [FN6] to measure the concentration of radioactive materials in restricted areas, [FN7] to survey the extent of radiation hazards in certain circumstances, [FN8] to provide personnel monitoring equipment to individuals who enter a restricted area in certain circumstances, [FN9] to post warning signs, [FN10] to report overexposure and excessive levels and concentrations of radiation, [FN11] to report to the NRC the level of exposure to an individual when that individual terminates his employment with the nuclear power plant, [FN12] and to notify and report to individuals incidents of exposure under certain circumstances. [FN13] For purposes of this Opinion, the Court assumes that these regulations provide the plaintiffs with federal rights. See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981) (declining to determine whether the statute at issue created rights enforceable under Section 1983); Uniformed Firefighters Ass'n v. City of New York, 676 F.2d 20, 23 n. 5 (2d Cir.1982) (same).

FN3. The applicable regulations are those that were in effect in 1985, the year the alleged violations occurred. See In re TMI, 67 F.3d 1103, 1108 n. 10 (3d Cir.1995) ("TMI III "); Corcoran I, 935 F.Supp. at 388 n. 10.

FN4. Plant employees are in "restricted areas." TMI III, 67 F.3d at 1110.

FN5. 10 C.F.R. § 20.1.

FN6. 10 C.F.R. § 20.101.

FN7. 10 C.F.R. § 20.103.

FN8. 10 C.F.R. § 20.201.

FN9. 10 C.F.R. § 20.202.

FN10. 10 C.F.R. § 20.203.

FN11. 10 C.F.R. § 20.405.

FN12. 10 C.F.R. § 20.408.

FN13. 10 C.F.R. § 20.409.

The presumption that Section 1983 provides an avenue of redress is rebutted if Congress intended to foreclose suit under Section 1983. Blessing, 117 S.Ct. at 1360; Bruneau, 163 F.3d at 756. A Section 1983 suit alleging statutory violations will be precluded if the statute at issue expressly forbids recourse under Section 1983, or if the statute creates "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." Blessing, 117 S.Ct. at 1360. See also Bruneau, 163 F.3d at 756 (citing Sea Clammers, 453 U.S. at 20).

Here, both conditions exist. A Section 1983 action is foreclosed because Congress created a private right of action known as a PLA. In addition, through passage of the AEA Congress explicitly barred a lawsuit based on the violations of the federal regulations at issue here.

a. PLA

Congress provided a private right of action for persons exposed to nuclear material through the Price-Anderson Act. A discussion of the history of the Price-Anderson Act and its amendments--including the creation of the PLA--was set forth in Corcoran I, 935 F.Supp. at 383-85, and in Judge Katz's Report and will be only briefly summarized here.

In 1988, the Price-Anderson Act was amended to create a federal cause of action--a PLA--defined as "any suit

asserting public liability." 42 U.S.C. § 2014(hh). A "public liability" encompasses (with exceptions not relevant here) "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear incident" is defined, in relevant part, as

> any occurrence within the United States causing, ... bodily injury, sickness, disease, or death, ... arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q) (emphasis supplied). An "occurrence" is not further defined in the statute. [FN14] See 42 U.S.C. § 2011 et seq.; Gilberg v. Stepan Co., 24 F.Supp.2d 325, 331-32 (D.N.J.1998); In re Cincinnati Radiation Lit., 874 F.Supp. 796, 832 (S .D.Ohio 1995). At least one court considering the definition of "occurrence," however, has concluded that it must involve the "escape or release of nuclear energy." In re Cincinnati Radiation Lit., 874 F.Supp. at 832. [FN15]

> FN14. The statute does define an "extraordinary nuclear occurrence" as
> any event causing a discharge or dispersal or source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the [NRC] ... determines to be substantial ....
> 42 U.S.C. § 2014(j).

> FN15. The In re Cincinnati court more specifically defined an "occurrence" as requiring an "unintended" release of nuclear energy. At least one other court has found that an "occurrence" need not be unintended, and that an intentional release of nuclear energy is also an "occurrence." Gilbert, 24 F.Supp.2d at 340.

Although the Price-Anderson Act does not itself explicitly foreclose a Section 1983 action, its creation of a PLA is evidence of Congress' intention to do so. For, where a statute's enforcement mechanism is sufficiently comprehensive, a Section 1983 suit is precluded even if it is not expressly foreclosed by the statute. See, e.g., Smith v. Robison, 468 U.S. 992, 1009-11 (1984) (Education of the Handicapped Act); Sea Clammers, 453 U.S. at 20-21 (Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act); Bruneau, 163 F.3d at 757 (Title IX). The enforcement scheme must, however, offer more than " 'the availability of administrative mechanisms to protect the plaintiff's interests." ' Blessing, 117 S.Ct. at 1363 (quoting Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 107 (1989)). A plaintiff will, therefore, be entitled to sue under Section 1983 where a statute's enforcement scheme is "generalized," or includes only limited grievance procedures for individuals. Id. (Title IV-D of the Social Security Act). See also Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 428 (1987) (Housing Act); Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 511-12 (1990) (Boren Amendments to the Medicaid program). Where a statute provides a private right of action, however, that is evidence that Congress intended to foreclose a remedy under Section 1983. Blessing, 117 S.Ct. at 1360.

The enforcement mechanism provided through the creation of a PLA is sufficiently comprehensive to foreclose a suit pursuant to Section 1983. As noted, a PLA allows a suit for damages for any broadly defined "nuclear incident." Given the breadth of the PLA's definition, the Third Circuit concluded that

> a determination that a particular plaintiff has failed to state a public liability claim potentially compensable

under the Price-Anderson Act is [a determination] that he has no such claim at all.

In re TMI Litigation Cases Consolidated II, 940 F.2d 832, 854 (3d Cir.1991).

Plaintiffs acknowledge that a PLA does not permit vindication of those rights based on the regulations issued under the Price-Anderson Act. Because the rules of decision for a PLA are derived from the laws of the state in which the incident occurred, federal regulations cannot provide those rules. See 42 U.S.C. § 2014(hh); Corcoran I, 935 F.Supp. at 388. Plaintiffs nonetheless argue that it is the violation of those federal regulations, and not Corcoran's exposure to radiation, which is the gravamen of this third complaint. In making this argument, the plaintiffs ask this Court to ignore the fact that plaintiffs' claim for damages would not exist but for Corcoran's alleged exposure to radiation. Any claim for such an exposure must be brought as a PLA. The existence of the right to bring a PLA provided Corcoran with a sufficient avenue of redress for the alleged injury to him. In any event, through its creation of the PLA, Congress foreclosed redress through resort to a Section 1983 action.

b. AEA

Even if plaintiffs' Section 1983 action to enforce NRC regulations were not precluded by the existence of the right to bring a PLA claim, it would be precluded by the AEA. Section 2271 of the AEA provides that

No action shall be brought against any individual or person for any violation under this chapter unless and until the Attorney General of the United States has advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General of the United States ....

42 U.S.C. § 2271 ("Section 2271") (emphasis supplied). The statute's plain language forbids private enforcement of regulatory violations. County of Suffolk v. Long Island Lighting Co., 728 F .2d 52, 59 (2d Cir.1984) (citing 42 U.S.C. § 2271 and affirming dismissal of complaint against power company "insofar as it seeks to enforce NRC-promulgated regulations"); Corcoran I, 935 F.Supp. at 388. Plaintiffs assert, however, that Section 2271 does not preclude their Section 1983 action because it does not provide a remedy for their injuries. Section 2271, plaintiffs contend somewhat cryptically, addresses "violations of federal law, and not violation of private federal rights" created by the federal regulations. [FN16]

> FN16. With this distinction plaintiffs attempt to distinguish their case from Long Island Lighting, 728 F.2d 52, in which residents in the areas around the Shoreham Nuclear Power Facility sought relief. The Second Circuit ruled that the claims regarding NRC regulations, insofar as they related to safety concerns, were preempted by the AEA, 728 F.2d at 58- 60. The Court found that the "responsibility to regulate and enforce the safety aspects of nuclear energy power plants must remain the sole province of the NRC's expertise." Here too the plaintiffs' allegations address safety issues and violations of NRC regulations. The Court's holding in Long Island Lighting regarding the preemptive effect of the AEA does not distinguish between types of safety violations, some "private" and others "federal."

As noted, the Court has assumed for purposes of analyzing the plaintiffs' claim that the NRC regulations create private, federal rights. Even where private rights are at stake, however, a suit pursuant to Section 1983 is precluded when Congress acts as it has done here to bar the action. Private suits to enforce regulations contravene

the plain language of the AEA; it was Congress' clear intention to maintain exclusive federal regulatory control over the nuclear power industry. See TMI III, 67 F.3d at 1108; O'Conner, 13 F.3d at 1096-97; Corcoran I, 935 F.Supp. at 385; Graham v. Niagra Mohawk Power Corp., 852 F.Supp. 150, 151 (N.D.N.Y. 1994). See also Silkwood v. Kerr McGee, 464 U.S. 238, 240-41 (1984) (the federal government alone regulates the safety aspects of nuclear energy). Plaintiffs' Section 1983 action for enforcement of NRC regulations is, therefore, precluded by the AEA.

2. Preclusion of constitutional claims by a PLA or the AEA

Plaintiffs next assert that defendants violated their constitutional rights to procedural and substantive due process, access to the courts, and equal protection, and they seek a remedy through Section 1983. Defendants move to dismiss on the grounds that these claims are also precluded by the existence of a PLA and the AEA.

While Congress may foreclose a remedy under Section 1983 for violations of a statute by expressly eliminating a Section 1983 cause of action or providing a comprehensive enforcement scheme within the statute, it is less clear that Congress may preclude a remedy under Section 1983 for constitutional claims. Congress may not eviscerate all avenues of redress for a constitutional violation. See Smith v. Robinson, 468 U.S. 992, 1012 n. 15 (1984) ("Even if Congress repealed all statutory remedies for constitutional violations, the power of the federal courts to grant relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction."); Bruneau, 163 F.3d at 763 ("It is irrefutable that Congress could not, by enacting a statute ... somehow erode or limit a constitutional right ...") (Oakes, J. concurring) (citing Robison, 468 U.S. 992). Congress

may, however, forbid an action for constitutional violations under Section 1983 where it provides an alternative means of protection of those rights. See, e.g., Smith, 468 U.S. at 1012 (Education of the Handicapped Act protects the equal protection rights of handicapped children); Bruneau, 163 F.3d at 758 (Title IX protects plaintiff's right to equal protection where plaintiff's equal protection claim under Section 1983 was "based on the same factual predicate" as her Title IX claim); Rumsey v. New York State Dep't of Correctional Servs., 19 F.3d 83, 93 (2d Cir.1994) (Veterans' Act provides comprehensive remedial scheme to protect veterans from discrimination). Where a statute does not provide an alternative remedy for the alleged constitutional violation, however, a remedy under Section 1983 remains available. See, e.g., Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142-43 (2d Cir.1993) (Title VII does not preclude suit under Section 1983 where the Section 1983 action was "based on substantive rights distinct from Title VII").

The existence of the right to bring a PLA does not provide a basis for protecting constitutional rights. As noted, a plaintiff bringing a PLA must rely on state law for the rules of decision. State law cannot form the basis of a federal constitutional claim. Nor may a private plaintiff assert a constitutional claim under the AEA, which vests the exclusive right to enforce the statute and its regulations in the Attorney General. See 42 U.S.C. § 2271(c). Because plaintiffs assert violations of their constitutional rights that cannot be protected under the enforcement schemes set forth in a PLA or the AEA, their Section 1983 claims alleging constitutional violations are not precluded by the existence of a PLA or the AEA.

3. Statute of limitations

Defendants next argue that any claim under Section 1983--whether for statutory or constitutional violations--is barred by the statute of limitations. [FN17] To resolve the statute of limitations issue, the Court must look beyond the pleadings to the evidence submitted by the parties. The Court will, therefore, apply the summary judgment standard.

> FN17. In this Opinion the Court has assumed the existence of each constitutional cause of action claimed.

New York State's three year statute of limitations applies to suits brought pursuant to Section 1983. See Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254, 256 (2d Cir.1998) (citing Owens v. Okure, 488 U.S. 235, 236 (1989)). Federal law determines when the limitations period begins to accrue. Zaghory v. New York State Dep't of Educ., 131 F.3d 326, 331 (2d Cir.1997). The statute of limitations begins to run from the date on which "the plaintiff knows or has reason to know of the injury which is the basis of his action." Pinaud v. County of Suffolk, 52 F.3d 1139, 1156 (2d Cir.1995) (internal quotation omitted). A plaintiff has reason to know of the basis for the cause of action when by the exercise of reasonable diligence it should have been discovered. See id. at 1157.

Defendants assert that the undisputed facts show that the plaintiffs became aware of their cause of action on March 16, 1992, when Corcoran was diagnosed with leukemia or on March 20, 1992, when that diagnosis was confirmed. Defendants note, and plaintiffs do not dispute, that during the physical examinations that led to the diagnosis of Corcoran's leukemia, the examining doctors discussed with Corcoran the possible link between leukemia and radiation exposure and asked Corcoran about his past work experience. Plaintiffs

counter that they were not aware that they had a cause of action until January 17, 1995, when Ellis spoke with Corcoran's co-worker Coli and Coli provided "previously unknown facts." Plaintiffs assert that although Corcoran's doctors asked him "routine questions about his occupation and told him radiation and/or certain chemicals can predispose an individual to leukemia," the doctors "never advised [Corcoran] that radiation caused his leukemia." (Emphasis in original.) In addition, plaintiffs assert in conclusory terms that Corcoran "had no knowledge that he was exposed to radiation," that defendants "consistently reassured [Corcoran] that he had not been exposed to radiation," and that defendants "covered up" plaintiffs' cause of action by failing to provide plaintiffs with information about Corcoran's radiation exposure.

It is undisputed that by March 20, 1992, Corcoran had learned from his doctors that his leukemia could have been caused by radiation. It is undisputed that Corcoran spoke with Coli in the spring or summer of 1992 to ask him to investigate whether he had been exposed to radiation at IP3 in 1985. Further, Ellis testified in her deposition that in March, April, or May, she suggested to Corcoran " 'that maybe he should see a lawyer because he had worked up at Indian Point and he has an identical twin brother who doesn't have leukemia ...." ' Ellis testified that in response to her suggestion that he seek legal advice, Corcoran " 'didn't say yes or no .... He basically listened and it was a short conversation." ' Ellis testified that Corcoran later told her that "the radiation issue was out because he was only at IP3 for two months."

The undisputed evidence shows that in 1992 Corcoran considered but declined to file a lawsuit claiming that he was injured as a result of excessive exposure to radiation. This decision was not unreasonable in light the diagnosis

he had received that he was suffering from asbestosis, his subsequent decision to pursue an asbestos lawsuit, as well as the absence of leukemia among those who had worked with Corcoran at IP3 in 1985. In sum, the undisputed evidence shows that by March 20, 1992, Corcoran knew, or by the exercise of reasonable diligence could have known, that his leukemia may have been caused by radiation exposure at IP3. Plaintiffs' civil rights claims, therefore, accrued on March 20, 1992. See Pinaud, 52 F.3d at 1156-57.

Plaintiffs filed this action on December 17, 1997, more than three years after March 20, 1992. Plaintiffs argue that their complaint in this action, however, should relate back to their complaint filed in Corcoran I, and the filing date of the Corcoran I complaint should be used for statute of limitations purposes. [FN18] The relation back doctrine allows a party to amend a complaint to add a claim that would otherwise be untimely where that claim relates back to an earlier, timely complaint. See Rule 15(c), Fed.R.Civ.P.; Wilson v. Fairchild Republic Co., Inc., 143 F.3d 733, 738 (2d Cir.1998). The purpose of the doctrine is "to prevent parties against whom claims are made from taking—unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 19 (2d Cir.1997) (internal quotation omitted). The "pertinent inquiry ... is whether the original complaint gave the defendant fair notice of the newly alleged claims ." Wilson, 143 F.3d at 738. A lawsuit, however, may not relate back to a complaint filed in a prior action. See, e.g., Bailey v. Northern Ind. Public Serv. Co., 910 F.2d 406, 413 (7th Cir.1990). [FN19]

> FN18. The Corcoran I complaint was filed on March 15, 1995, in New York State court and was removed to federal court on July 18, 1995.

FN19. Plaintiffs' reliance on Bornholdt v. Brady, 869 F.2d 57, 68 (2d Cir.1989), for the proposition that a complaint may relate back to a complaint in a prior, dismissed action, is misplaced. In Bornholdt, plaintiff's first action ("Bornholdt I "), challenging an employment termination under the Age Discrimination in Employment Act, was dismissed for failure to allege the existence of a final agency determination--an exhaustion requirement. Plaintiff later learned that the agency had in fact issued its final determination before the dismissal of Bornholdt I, but had failed to inform the plaintiff of its decision. In Bornholdt II plaintiff repeated the allegations from Bornholdt I with the additional allegation of exhaustion. By the time Bornholdt II was filed, however, the statute of limitations had run. The plaintiff argued that his complaint should relate back to Bornholdt I. The Second Circuit found that under the unique circumstances--where the decision in prior action was based on misinformation provided by the defendants--the complaint would be deemed to relate back to the prior action, or that the court, under its equitable powers, would re-open Bornholdt I due to the defendants' misrepresentation. In this case, plaintiffs have not identified any misrepresentation by defendants and have asserted causes of action not alleged in Corcoran I.

Application of the relation back doctrine is inappropriate for another reason as well. Although the complaint in this action alleges facts virtually identical to those alleged in Corcoran I, the plaintiffs have sued new defendants in this action, and therefore, the defendants named herein were not on notice through the filing of

Corcoran I of the allegations against them. Because plaintiffs' complaint does not relate back to the Corcoran I complaint, and because the complaint was not filed within the period of limitations, plaintiffs' claims are time-barred unless the limitations period was tolled.

Plaintiffs claim that the limitations period should be tolled because Corcoran relied "to his detriment, on defendants' wrongful act or negligent act," that is, that defendants failed to comply with NRC regulations and to provide Corcoran with proper notification about his contamination. Corcoran, plaintiffs contend, "should not have had to scrounge for information from co- workers who feared their jobs would be jeopardized if they tried to help him ." In addition, they assert that defendants assured Corcoran that he was not exposed to excessive radiation.

Plaintiffs' assertions do not serve to toll the statute of limitations. Corcoran had sufficient knowledge by March 20, 1992, to believe that his leukemia may have been caused by radiation exposure. The undisputed evidence shows that Corcoran considered filing a claim. Corcoran knew that the defendants had provided him with no notice of any exposure to radiation, and was sufficiently concerned to ask Mr. Coli to conduct an informal investigation. He was thus aware of the "critical facts" in support of his claim; defendants did not conceal the availability of a cause of action under Section 1983. [FN20] As a consequence, equitable tolling of the statute of limitations is unavailable. See, e.g., Kronisch v. United States, 150 F.3d 112, 123 (2d Cir.1998) (Bivens action); cf. Farkas v. Farkas, No. 98-7141, slip op. 1735 (2d Cir. Feb. 23, 1999) (equitable estoppel under New York law).

> FN20. In addition, tolling the statute of limitation will severely prejudice the defendants. No party is certain where Corcoran worked at IP3 and

whether he was ever stationed at stop valve # 32. Because Corcoran died before this suit was filed, he cannot provide this information to the parties.

In sum, plaintiffs' statutory claims under Section 1983 would be barred by the statute of limitations even if they were not otherwise precluded. Plaintiffs' constitutional claims, which are not precluded by statute, are time-barred and must be dismissed. [FN21]

FN21. Carrie Corcoran also alleges that her father's premature death denied her her substantive due process right to her relationship with he father. To the extent such a claim exists, it accrued when Corcoran died on September 25, 1993. Plaintiffs failed to file this claim within three years, and it too must be dismissed as time-barred.

C. Section 1985 and Section 1986

Plaintiffs next allege that the defendants conspired to intimidate Stephen Coli, one of their witnesses, in violation of Section 1985 and Section 1986. [FN22] Defendants argue that plaintiffs fail to state a claim. The Report correctly recommended dismissal of these claims on the alternative grounds that the claims are wholly conclusory and time-barred. In addition, as described below, the statutes do not apply to the conduct alleged.

FN22. Plaintiffs asserted these claims for the first time in their Opposition Brief. Because the plaintiffs proceed pro se the Court considers the allegations set forth by the plaintiffs in the brief as well as in the complaint. See Boguslavsky v. Kaplan, 159 F.3d 715, 719 (2d Cir.1998).

The first clause of Section 1985(2), in relevant part, proscribes conspiracies to

> deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.

42 U.S.C. § 1985(2) (emphasis supplied). The remedial provision of the statute provides that if one or more persons engaged in such a conspiracy

> do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, ... the party so injured ... may have an action for the recovery of damages occasioned by such injury ... against any one or more of the conspirators.

42 U.S.C. § 1985(3); Haddle v. Garrison, 119 S.Ct. 489, 491 (1998). To state a claim under Section 1985(2), plaintiffs must allege (1) a conspiracy between two or more persons (2) to deter a party or witness from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff. Chahal v. Paine Webber, Inc., 725 F.2d 20, 23 (2d Cir.1984). [FN23] A "witness" includes an individual who is a potential witness in a case. Id. at 24. A conspiracy to deter the filing of a lawsuit will not violate Section 1985(2); a lawsuit must be pending at the time the alleged conspiracy occurred. See Rasmussiah v. Avalinia Amalia Enterprise, No. 90 Civ. 0856, 1990 WL 127561 (E.D.N.Y.1990).

> FN23. Unlike a claim brought under Section 1985(3), a plaintiff alleging a violation of the first part of Section 1985(2) need not show that the defendant acted with class-based animus.

Zemsky v. City of New York, 821 F.2d 148, 151 n. 4 (2d Cir.1987) (citing Kush v. Rutledge, 460 U.S. 719, 726 (1983)).

Plaintiffs allege that defendants conspired to prevent Stephen Coli-- Corcoran's co-worker who attempted in 1992 to investigate whether Corcoran was exposed to excessive radiation at IP3--from testifying or otherwise participating as a witness. All of the actions that the defendants allegedly took to silence Coli are alleged to have occurred in 1992. Thus, the alleged intimidation of Coli occurred roughly three years before Corcoran I was filed, and roughly six years before this action was filed.

The defendants moved to dismiss this claim on the ground, inter alia, that the alleged conspiracy pre-dated any lawsuit. In response, the plaintiffs have not argued that the conspiracy occurred during the pendency of any lawsuit. Rather, they rely on Brever v. Rockwell Int'l Corp., 40 F.3d 1119 (10th Cir.1994), for the proposition that an action need not be pending at the time the witness is intimidated. In Brever, the court held that the plaintiff had standing as a grand jury witness to sue under Section 1985(2), id. at 1125, and that she had alleged sufficient acts to support a claim of conspiracy to deter her from testifying before a grand jury, id. at 1129. The threats against the plaintiff began before the federal grand jury convened, id. at 1128 n. 11, and continued after grand jury proceedings were initiated, id. at 1123. The court noted that the acts committed before the grand jury was convened "were part of an ongoing conspiracy to silence and deter [plaintiff] from cooperating with the FBI and testifying in the impending grand jury investigation." Id. at 1128 n. 11. "On these facts," the court concluded, "because the grand jury convened less than two months after the FBI first raided [the witness's employer] and a mere six weeks after the alleged conspiratorial acts occurred," it was fair to consider

plaintiff's allegations of conspiratorial acts that occurred prior to any officially pending litigation. Id.

Unlike the intimidation experienced by the plaintiff in Brever, the intimidation of Coli is not alleged to have continued after litigation was brought. Absent any allegation that the conspiracy existed when a lawsuit was pending, the plaintiffs have failed to state a claim. [FN24] See, e.g., Rasmussiah, 1990 WL 127561 at *1.

> FN24. Plaintiffs initially filed Corcoran I in state court. The second clause of Section 1985(2) prohibits, in relevant part, conspiracies "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws ...." 42 U.S.C. § 1985(2). Unlike the first clause of Section 1985(2), the second clause addresses conspirators who act with an intent to deny equal protection, and accordingly a plaintiff must allege class-based discriminatory animus. Rasmussiah, 1990 WL 127561 at *2. To the extent that plaintiffs allege a conspiracy to interfere with an action they planned to file in state court the complaint must also be dismissed for failure to state a claim because they do not allege that the conspirators acted with class-based animus.

Section 1986 imposes liability on an individual who has knowledge of wrongs prohibited by Section 1985. 42 U.S.C.1986; Thomas v. Roach, 165 F.3d 137, 147 (2d Cir.1999); Graham v. Henderson, 89 F.3d 75, 82 (2d Cir.1996). If there is no liability under Section 1985, none will be imposed under Section 1986. Thomas, 165 F.3d at 147. Having found that the plaintiffs fail to state a claim under Section 1985, the Section 1986 claim must be dismissed.

D. Cross-Motion to Amend the Complaint

The plaintiffs cross-move to amend the complaint to name the defendants in their individual and official capacities, to add additional claims alleging a policy and practice to deny constitutional rights, to add a claim for witness intimidation, and to add allegations regarding Westinghouse's "role and understanding of the conditions favoring contamination of the turbine components in the IP3 plant during 1985." Judge Katz recommended that the cross-motion be denied.

Most courts considering the question have concluded that a ruling regarding amendment of a complaint is non-dispositive. See, e.g., Pagano v. Frank, 983 F.2d 343, 346 (1st Cir.1993); Moss v. Stinnes Corp., No. 92 Civ. 3788, 1995 WL 338315 at *1 (S.D.N.Y. June 7, 1995). But see, e.g., Mitchell v. Cronin, No. 92 Civ. 7360, 1993 WL 427441 at *1 (S.D.N.Y. Oct. 19, 1993). A magistrate's recommendation regarding non-dispositive matters is set aside only if it is clearly erroneous or contrary to law. Rule 72(a), Fed.R.Civ.P. Judge Katz's recommendation that the motion to amend the complaint be denied is correct even if reviewed de novo.

Rule 15(a), Fed.R.Civ.P., provides that leave to amend a complaint shall be freely given. The court may deny a motion to amend, however, where amendment would be futile or where the proposed amendment has no merit. See, e.g., Hunt v. Alliance North American Government Income Trust, Inc., 159 F.3d 723, 728 (2d Cir.1998).

Each of plaintiffs' proposed amendments would be futile. It would be futile to add plaintiffs' policy and practice claim to the Section 1983 allegations, because, for the reasons discussed above, this claim would be barred by the statute of limitations. A claim that defendants

maintained a policy and practice to deny statutory rights is precluded by the existence of a PLA and the AEA, and is also time-barred. The proposed additional complaints regarding Westinghouse would be futile for the same reasons. The proposed additional allegations regarding the witness intimidation claim under Section 1985(2) would also be futile because plaintiffs fail to allege that a conspiracy occurred at the time an action in federal court was pending, and, therefore, do not state a claim under Section 1985(2). [FN25] Consequently, the motion to amend is denied.

> FN25. If plaintiffs intended to claim a violation of Section 1985(2) for a conspiracy to interfere with a state court action, the motion to amend would be futile because of plaintiffs' failure to allege class-based animus.

E. Motion for Sanctions

The defendants move for sanctions pursuant to Rule 11, Fed.R.Civ.P. Judge Katz denied the motion for sanctions and for an injunction barring plaintiffs from filing additional litigation against NYPA, Westinghouse, or their employees in connection with the alleged injuries incurred by Corcoran at IP3. Judge Katz recommended, however, that

> plaintiffs be warned that, apart from a direct appeal of this Court's decision, any further litigation involving the same issues and/or parties will be considered frivolous and vexatious, and may result in the issuance of injunctive relief, as well as an award of attorneys' fees.

Defendants do not object to the recommendation that the motion for sanctions or for an injunction be denied. The plaintiffs, however, object to the "warning" given by Judge Katz.

The basis for Judge Katz's recommendation is not hard to discern. The plaintiffs have filed three separate lawsuits arising out of the same incident. Each has involved voluminous submissions, with extensive and repetitive motion practice. Corcoran I was followed by a lengthy motion for reconsideration. This litigation has extended over five years, all at great cost to the parties. As Judge Katz appropriately observed,

> [a]lthough proceeding pro se, as a young attorney embarking on her career, plaintiff should be sensitive to the distinction between vigorous advocacy and indiscriminate, obsessive, and personalized litigation tactics.

The Court adopts Judge Katz's warning: the time has arrived for appellate review.

Conclusion

The December 1, 1998 Report of Magistrate Judge Katz is adopted in its entirety. The defendants' motion to dismiss or for summary judgment is granted. The defendants' motion for sanctions is denied. The plaintiffs' cross-motion to amend the complaint is denied. The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
March 29, 1999

s/

DENISE COTE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of December, one thousand nine hundred and ninety-nine.

PRESENT:

Hon. John M. Walker, Jr.,
Hon. Robert D. Sack,
Circuit Judges,
Hon. Robert M. Berman,*
Judge.

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*The Honorable Richard M. Berman of the United States District Court for the Southern District of New York, sitting by designation.

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CARRIE CORCORAN, as Executrix of the Estate of EUGENE CORCORAN, deceased, and CARRIE CORCORAN, individually,

No. 99-7545

Plaintiffs-Appellants,

-v-

LEROY W. SINCLAIR, J.P. BAYNE, JOHN C. BRONS, WILLIAM JOSIGER, J. RUSSELL, DENNIS QUINN, JOSEPH PERROTTA, HUGH GILMARTIN, IAN MEW, ROBERT DESCHAMPS, PAUL SAUNDERS, JOHN NEFF, MARYANN CHAUBARD, THOMAS MICHAEL PHILLIPS, RICK MOULD, CHARLES FLORIN, STEVEN TENCZA, AND DOES 1 through 25, inclusive,

Defendants-Appellees.

----------x

APPEARING FOR APPELLANTS:

CARRIE CORCORAN
Macungie, PA

APPEARING FOR APPELLEES:

WENDY FLEISHMAN
(Sheila L. Birnbaum and Peter J. McKenna, on the brief), Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY
(Donald E. Jose, Jose & Wiedis, West Chester, PA , on the brief)

Appeal from the United States District Court for the Southern District of New York (Denise L. Cote, District Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Plaintiff-appellant Carrie Corcoran, both on her own behalf and as executrix of the estate of her father, Eugene Corcoran, appeals from the March 30, 1999 judgement of the district court granting summary judgment to defendant-appellants, various individuals from the New York Power Authority and the Westinghouse Electric Corporation, and denying plaintiffs' cross motion to amend their complaint. We affirm substantially for the reasons stated by the district court. See Corcoran v. Sinclair, 1999 WL 177444 (S.D.N.Y. Mar. 30, 1999).

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
Karen Greve Milton, Acting Clerk

By:_____
RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the united States Courthouse, Foley Square, in the City of New York, on the 7th day of February, two thousand

Present:

Hon. Walker
Hon. Sack,
Circuit Judges
Hon Richard M. Berman*

Corcoran

Plaintiff-Appellant

Docket No: 99-7545

v.

Sinclair

Defendant-Appellee.

A petition for panel rehearing having been filed herein by the appellant Corcoran.%
Upon consideration by the panel that decided the appeal, it is Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk
By: s/
Beth J. Meador, Administrative Attorney

*The Honorable Richard M. Berman of the United States District Court for the Southern District of New York, sitting by designation.

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FEDERAL RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

USCS Fed Rules Civ Proc R 11 (1999)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature.Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

b) Representations to Court.By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or
to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery.Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

HISTORY: (Amended Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

USCS Fed Rules Civ Proc R 15 (1999)

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or

defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

HISTORY: (Amended July 1, 1963; July 1, 1966, Aug. 1, 1987; Dec. 1, 1991; Dec. 9, 1991, P.L. 102-198, @ 11(a), 105 Stat. 1626; Dec. 1, 1993.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1991. Act Dec. 9, 1991, in subsec. (c)(3), substituted "Rule 4(j)" for "Rule 4(m)".

Other provisions:

Notes of Advisory Committee on Rules. See generally for the present federal practice, former Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills--Form); USC, Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) and former @ 777 (Defects of Form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O 28, rr 1-13; O 20, r 4; O 24, rr 1-3. Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont Rev Codes Ann (1935) § 9186; 1 Ore Code Ann (1930) § 1-904; 1 SC Code (Michie, 1932) § 493; English Rules Under the Judicature Act (The Annual Practice, 1937) O 28, r 2. Provision for

amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading (1928) pp. 498, 509.

Note to Subdivision (b). Compare former Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice" (e. g., Ark Civ Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e. g., NM Stat Ann (Courtright, 1929) §§ 105-601, 105-602).

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala Code Ann (Michie, 1928) § 9513; Ill Rev Stat (1937) ch 110, § 170(2); 2 Wash Rev Stat Ann (Remington, 1932) § 308-3(4). See USC, Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) for a provision for "relation back."

Note to Subdivision (d). This is an adaptation of Equity Rule 34 (Supplemental Pleading).

Notes of Advisory Committee on 1963 amendments to Rules. Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by thecommentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See Bonner v Elizabeth Arden, Inc. 177 F2d 703 (2d Cir 1949); Bowles v Senderowitz, 65 F Supp 548 (ED Pa), revd on other grounds, 158 F2d 435 (3d Cir 1946), cert denied, Senderowitz v Fleming, 330 US 848, 67 S Ct 1091, 91 L Ed 1292 (1947); cf. LaSalle Nat. Bank v 222 East Chestnut St. Corp. 267 F2d 247 (7th Cir), cert denied, 361 US 836, 80 S

Ct 88, 4 L Ed 2d 77 (1959). But see Camilla Cotton Oil Co. v Spencer Kellogg & Sons, 257 F2d 162 (5th Cir 1958); Genuth v National Biscuit Co. 81 F Supp 213 (SD NY 1948), app dism, 177 F2d 962 (2d Cir 1949); 3 Moore's Federal Practice P 15.01[5] (Supp 1960); 1A Barron & Holtzoff, Federal Practice & Procedure 820-21 (Wright ed 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. Blau v Lamb, 191 F Supp 906 (SD NY 1961); Lendonsol Amusement Corp. v B. & Q. Assoc., Inc. 23 FR Serv 15d.3, Case 1 (D Mass 1957). Notes of Advisory Committee on 1966 amendments to Rules. Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may

secure review of the decision by bringing a civil action against that officer within sixty days. 42 USC @ 405(g) (Supp III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provisions . . . that suit be brought within sixty days . . . ." Cohn v Federal Security Adm. 199 F Supp 884, 885 (WD NY 1961); see also Cunningham v United States, 199 F Supp 541 (WD Mo 1958); Hall v Department of HEW, 199 F Supp 833 (SD Tex 1960); Sandridge v Folsom, Secretary of HEW, 200 F Supp 25 (MD Tenn 1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 USC § 405(g). See 29 Fed Reg 8209 (June 30, 1964); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo LJ 19, 42-43 (1964); see also Simmons v United States Dept. HEW, 328 F2d 86 (3d Cir 1964).] Analysis in terms of "new proceeding" is traceable to Davis v L. L. Cohen & Co. 268 US 638 (1925), and Mellon v Arkansas Land & Lumber Co. 275 US 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the Davis and Mellon cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute

limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period--in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harv L Rev 40 (1963); see also Ill Civ P Act §46(4). Much the same question arises in other types of actions against the government (see Byse, supra, at 45 n 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, Federal Practice & Procedure § 451 (Wright ed 1960); 1 id @ 186 (1960); 2 id § 543 (1961); 3 Moore's Federal Practice, par 15.15 (Cum Supp 1962); Annot, Change in Party After Statute of Limitations Has Run, 8 ALR2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct . . . set forth . . . in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action--the notice need not be formal--that he would not be prejudiced in defending the action, and second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party.

Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers). The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

Notes of Advisory Committee on 1987 amendments to Rules. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on December 1991 amendment of Rule. The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.

Paragraph (c)(1). This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law. Generally,the applicable limitations law will be state law. If federal jurisdiction is based on the citizenship of the parties, the primary reference is the law of the state in which the district court sits. Walker v.

Armco Steel Corp., 446 U.S. 740 (1980). If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. E.g., Board of Regents v. Tomanio, 446 U. S. 478 (1980). In some circumstances, the controlling limitations law may be federal law. E.g., West v. Conrail, Inc. 107 S. Ct. 1538 (1987). Cf. Burlington Northern R. Co. v. Woods, 480 U. S. 1 (1987); Stewart Organization v. Ricoh, 108 S. Ct. 2239 (1988). Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim. Accord, Marshall v. Mulrenin, 508 F. 2d 39 (1st cir. 1974). If Schiavone v. Fortune, 106 S. Ct. 2379 (1986) implies the contrary, this paragraph is intended to make a material change in the rule.

Paragraph (c)(3). This paragraph has been revised to change the result in Schiavone v. Fortune, supra, with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in Schiavone v. Fortune that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure, 63 NOTRE DAME L. REV. 720 (1988); Brussack, Outrageous Fortune: The Case for Amending Rule 15(c) Again, 61 S. CAL. L. REV.

671 (1988); Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 86 MICH. L. REV. 1507 (1987).

In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

This revision, together with the revision of Rule 4(i) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in Gardner v. Gartman, 880 F. 2d 797 (4th cir. 1989), Rys v. U. S. Postal Service, 886 F. 2d 443 (1st cir. 1989), Martin's Food & Liquor, Inc. v. U. S. Dept. of Agriculture, 14 F. R. S. 3d 86 (N. D. Ill. 1988). But cf. Montgomery v. United States Postal Service, 867 F. 2d 900 (5th cir. 1989), Warren v. Department of the Army, 867 F. 2d 1156 (8th cir. 1989); Miles v. Department of the Army, 881 F. 2d 777 (9th cir. 1989), Barsten v. Department of the Interior, 896 F. 2d 422 (9th cir. 1990); Brown v. Georgia Dept. of Revenue, 881 F. 2d 1018 (11th cir. 1989).

Notes of Advisory Committee on 1993 amendments to Rules. The amendment conforms the cross reference to Rule 4 to the revision of that rule.

NOTES:
COMMENTARY
by Prof. David A. Sonenshein Temple University Beasley School of Law The National Institute for Trial Advocacy Notre Dame Law School

Rule 15(a) sets forth a liberal policy that permits a party to amend or modify a pleading. A party may amend a leading as of right (i.e. without leave of court) before a responsive pleading is filed or within 20 days of service if no responsive pleading is required to the pleading to be amended. If a responsive pleading has been filed or 20 days has elapsed since service, an amendment is allowed only by leave of court or by written consent of the adverse party. Once the amendment is effected, the adverse party must plead its response within the time remaining to respond to the original pleading or 10 days, whichever is longer.

When sought from the court by motion, leave to amend "should be freely given when justice so requires." In Foman v. Davis, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962), the Supreme Court interpreted this language as providing that leave to amend should be granted, in the absence of bad faith, unless the adverse party will be prejudiced by the amendment, the adverse party will incur additional expense, or the addition of new issues would confuse the jury.

Rule 15(b) provides for the amendment of the pleadings during and even after trial where the issues which are the subject of the amendment are actually tried by the express or implied consent of the parties.

Rule 15(c) provides that the amendment of a pleading relates back to the date of the original pleading for purposes of tolling the statute of limitations where:

(1) relation back is permitted by law, or (2) the claim or defense asserted in the amended pleading arose out of the same conduct, transaction, or occurrence set forth in the original pleading, or (3) the amendment changes the party against whom the original claim is asserted where: (A) the claim or defense arises out of the same conduct, transaction or occurrence set forth in the original pleading; and (B) service of the summons and complaint is made within the time allowed for service by Rule 4(m) (120 days post-filing); and (C) the party to be brought in by the amendment has received notice of the institution of the action such that the party will not be prejudiced in maintaining a defense on the merits; and (D) the party to be brought in by the amendment knew or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party named in the amendment. Courts have split on whether "notice of the institution" of the original action requires the newly named party to have actual notice of the filing of the original action or simply to have notice of the event or occurrence which gave rise to the original action.

Rule 15(d) provides for the allowance of supplemental pleadings on motion. A supplemental pleading asserts events, transactions or occurrences that took place subsequent to the filing of the pleading to be supplemented. Thus, reference to events or transactions which took place prior to the filing of the original complaint must be asserted by amendment. The supplemental pleading may be used to change or add relief sought, update a pleading with later events, or add new defenses that arose after the filing of the complaint.

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FEDERAL RULES OF CIVIL PROCEDURE
VII. JUDGMENT

USCS Fed Rules Civ Proc R 59 (1999)

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion.Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits.When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds.No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment.Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

HISTORY: (Amended March 19, 1948; July 1, 1966.)
(Amended Dec. 1, 1995.)